18. Suspension of Acceptance and Processing of Applications:

261. *Background.* In the *NPRM*, we concluded that we would process pending ITFS applications filed prior to release of the *NPRM* provided that they were not mutually exclusive with other applications as of the release date of the *NPRM*.[599] We stated that this approach gives due deference to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. We also stated that we would not accept settlement agreements relating to mutually exclusive ITFS applications filed after the release date of the *NPRM*, but that we would act on settlement agreements filed prior to release of the *NPRM* that are compliant with our rules.[600] We noted that the Commission has used this approach in other services where it proposed a transition to geographic area licensing.[601]

262. We tentatively concluded that upon adoption of this *R&O*, we would dismiss, without prejudice, applications for ITFS stations filed prior to the adoption of the *NPRM* that do not meet the above criteria.[602] We sought comment from any parties proposing that we retain such applications and asked these parties to address how such applications should be processed, particularly in the event of any auction for spectrum covered by the application.[603]

263. *Discussion.* After reviewing the comments we received, we conclude that we will adopt our tentative conclusion. HITN asserts that "only entities whose applications are currently mutually exclusive and that have been accepted for filing by the Commission should be permitted to participate in

[599] *See NPRM*, 18 FCC Rcd at 6813-14 ¶ 228. In the interest of completeness, we note that in the *NPRM* we stated that effective as of its *release* date, we would suspend acceptance of applications for ITFS channels for new licenses, amendments or modifications for any kind of station temporarily, except for ITFS channels that involve minor modifications, assignment of license or transfer of control. We explained the suspension is effective until further notice and applies to applications received on or after the date of release of the *NPRM*. *See NPRM*, 18 FCC Rcd at 6813 ¶¶ 226-227. On August 8, 2003, however, we modified the freeze by allowing the filing of applications for new licenses and major modifications of MDS stations adopted in the *MO&O*. With respect to ITFS stations, we accepted major change applications, subject to the existing requirement that a licensee may not modify its protected service area (PSA). As modified, the freeze on MDS and ITFS applications will revert to the *status quo ante* that applied before the *MO&O* was adopted. *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Part 1 of the Commission's Rules - Further Competitive Bidding Procedures, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, WT Docket No. 03-66 RM-10586, WT Docket No. 03-67, MM Docket No. 97-217, WT Docket No. 02-68 RM-9718, *Second Memorandum Opinion and Order*18 FC Rcd 16848 (2003).

[600] *See NPRM*, 18 FCC Rcd at 6813-14 ¶ 228. If we approve such a settlement agreement, we will allow the processing and grant of the remaining non-mutually exclusive applications. *Id.*

[601] *See, e.g.*, Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-17016 (1997).

[602] *See NPRM*, 18 FCC Rcd at 6813-14 ¶ 228.

[603] *Id.*

an auction against each other for the channels that are subject to those applications."[604] We disagree with HITN, and note that with regard to pending applications in other services that have been converted to geographic area licensing, the Commission has dismissed the pending mutually exclusive applications at bar.[605] Thus, we dismiss all applications for ITFS stations that were filed prior to adoption of the *NPRM* where: the applications are mutually exclusive, and the applicants filed settlement agreements subsequent to the release of the *NPRM*, and/or applicants filed settlement agreements prior to the release of the *NPRM*, but the settlement agreement did not comply with our rules.[606]

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Licensing All Available Spectrum Pursuant to the New Band Plan

264. We now consider what further actions, if any, may be necessary to achieve potential benefits of the new band plan and service rules, such as deployment of new broadband services, throughout the entire band. In the foregoing *Report and Order*, we adopted a new band plan for the 2496-2690 MHz band, *i.e.*, for EBS and BRS spectrum, to further various public interest objectives, including the public interest in efficient and intensive use of the spectrum. To facilitate transition of EBS and BRS incumbents to the new band plan, we have established a three-year period during which a "proponent," either unilaterally or in combination with other proponents, can develop and file an Initiation Plan for moving all EBS and BRS licensees within the proponent's MEA to new spectrum assignments under the new band plan, subject to certain requirements and safeguards. The three-year limit on filing Initiation Plans provides an incentive for existing users to develop transition proposals in a timely manner. However, proponents' Initiation Plans may not be sufficient, without additional action, to achieve throughout the entire band all the benefits made possible by the *Report and Order*. For example, Initiation Plans cannot put to use spectrum currently unassigned to any incumbent. Moreover, the filing of Initiation Plans is purely voluntary and consequently Initiation Plans may not be filed covering all MEAs.

265. Accordingly, in this *Further Notice,* we seek comment on how best to license EBS and BRS spectrum that timely-filed Initiation Plans would leave either unassigned or un-transitioned. In addition, we seek comment on whether an alternative process for transitioning areas not governed by Initiation Plans proposed in this *Further Notice* should be open to individual licensees that are subject to timely-filed Initiation Plans and subsequently would prefer to participate in the alternative process. We seek comment on all aspects of the proposals set forth below, as well as any comment on alternatives that commenters may suggest to address the relevant policy objectives.

1. New Licenses to Be Assigned by Auction

266. As a general matter, we propose to assign by auction any new licenses for spectrum in the band, with any auction being open to all parties, both incumbents and new entrants, potentially eligible to hold the licenses offered. Accordingly, licenses with restricted eligibility, such as EBS licenses, could be bid on only by parties potentially meeting all the restrictions on licensees. An auction is most likely to assign the license to the qualified licensee that most highly values it if the auction is open to all potentially

[604] *See* HITN Comments at 9-10.

[605] *See* n.601, *supra.*

[606] *See* Appendix E for list of dismissed applications. *See* Appendix F for a list of dismissed pleadings relating to the dismissed applications.

qualified licensees.[607] The new band plan and service rules, together with geographic area licensing, will give licensees greater operational flexibility to modify, move, and add to their facilities, which may improve spectrum utilization. In addition, this greater operational flexibility may result in new and competing proposals for utilizing the public spectrum resource from new parties. Applicants intending very different uses of the new licenses can express the respective values a particular license has for their intended use in easy to compare competitive bids. This enables the Commission rapidly to assign licenses to parties most likely to put them to their highest value use.

267. We previously sought comment on potential auctions in this band in the initial *Notice of Proposed Rulemaking*. We now seek comment on potential auctions in light of the Commission's decisions in the *Report and Order* regarding the new band plan, the new service rules, and the process for proponents to prepare Initiation Plans to transition MEAs to the new band plan. To the extent that commenters believe that previously filed comments remain relevant in this new context, we ask that they file new comments explaining why their prior positions continue to apply. In order to assure that all potential parties have an opportunity to address issues relating to potential auctions in this new context, we reiterate our requests for comment on some particular details of the auction process in this new context. In addition to seeking comment on the proposals discussed herein, we seek comment on alternative approaches.

268. In MEAs where proponents timely file Initiation Plans, we propose to assign by auction new licenses for unassigned spectrum, *i.e.,* for spectrum in any unassigned frequency blocks and in geographic areas outside incumbent licensees' GSAs. Such unassigned spectrum will be composed primarily, if not exclusively, of EBS spectrum, given that the Commission exhaustively licensed MDS spectrum by assigning overlay MDS licenses following Commission Auction No. 6.[608] As discussed below, we seek comment on whether we should make licenses for this spectrum available in a particular MEA in response to the filing of an Initiation Plan or hold the spectrum for a general auction of all potentially available spectrum in the band.

269. In MEAs where no proponent timely files an Initiation Plan, we seek comment on a proposed process for transitioning to the new band plan. As detailed below, we propose to make all spectrum in such MEAs available by clearing existing spectrum assignments, issuing incumbent EBS and BRS licensees modified licenses to continue current operations until new licensees give notice of intent to offer incompatible new services and transferable bidding offset credits to preserve their ability to access spectrum of comparable value. We then would assign by auction new licenses in such MEAs pursuant to the new band plan. We seek comment on all aspects of this proposal, as well as alternatives.

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[607] *See generally* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360-2361, ¶¶ 70-71 (1994). Citing prior Commission proceedings, the Coalition proposed that participation in an auction of ITFS white space should be limited solely to parties with pending applications for licenses associated with unassigned ITFS spectrum. White Paper at 41 and n.111 (quoting 13 FCC Rcd at 16,002). Previously, the Commission observed that "it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1)," and therefore the only "eligible bidders in any auction of the pending ITFS applications" ought to be "those with applications already on file." *Id.* However, this prior observation applied solely with respect to "any auction of the *pending ITFS applications*[.]" Those applications have been otherwise resolved. We propose that the auction for clear spectrum discussed herein will be open to all qualified applicants for the reasons set forth above.

[608] In the event that particular overlay licenses were returned or otherwise cancelled, there may be unassigned MDS spectrum available for licensing.

270. In addition, we also seek comment on whether, in MEAs where proponents timely file Initiation Plans, individual licensees subject to the Initiation Plan should be given the option of participating in the proposed process for transitioning other areas to the new band plan. In brief, individual licensees that for any reason did not want to accept the new spectrum assignment resulting from the Initiation Plan could relinquish their new assignment in exchange for a modified license and a transferable bidding offset credit. Such action might place all potentially available licenses in the band in a single auction. As discussed further below in connection with new license areas, this process also may facilitate the creation of larger, more functional geographic areas than the new licenses created pursuant to the Initiation Plan. We seek comment on whether such an option might serve the public interest in use of the spectrum generally, and particularly whether such an option might facilitate implementation of Initiation Plans by giving opponents subject to Initiation Plans a viable alternative.

a. When to Assign New Licenses

271. As an initial matter, we seek comment on whether the timely filing of an Initiation Plan should result in licenses for unassigned spectrum in the relevant MEA being made available for assignment within a specified time period after the filing. Generally, one option would be to conduct a single auction of licenses for all available spectrum in the band after the close of the three-year period for filing Initiation Plans, whether the spectrum was unassigned, cleared for purposes of transitioning MEAs to the new band plan, or relinquished by incumbents voluntarily clearing already transitioned spectrum. This would enable all potentially interested parties to participate in a single, simultaneous auction offering transparent price information regarding substitutable or complementary licenses in the band. However, previously unassigned spectrum might be primarily, or even exclusively, of interest to incumbent licensees in an area subject to a proponent's timely-filed Initiation Plan. In such a case, the benefit of making that spectrum available to enhance the Initiation Plan's transition to the new band plan might outweigh the benefit of offering that spectrum in a potential future auction of all available spectrum in the band. Alternatively, however, making unassigned spectrum available as a result of the filing of an Initiation Plan could delay the development or implementation of Initiation Plans by posing unanticipated variables for the proponent.

272. To assist in determining whether one of these or some other scenario is likely to occur, we seek comment on when to assign new licenses by auction for unassigned spectrum in MEAs subject to timely-filed Initiation Plans. Should we wait until the time for filing Initiation Plans expires, so that all spectrum potentially available for new licenses can be identified? Or should we assign licenses for unassigned spectrum in an MEA as soon as possible after the timely filing of an Initiation Plan? How quickly should auctions for such licenses be held after the timely filing of the Initiation Plan? Should there be a minimum amount of time following the filing of an Initiation Plan before such an auction should be held? Should there be a maximum amount of time? We note that it appears impractical to conduct auctions for each MEA as Initiation Plans are filed. Is the unassigned spectrum likely to be of interest to parties other than incumbent EBS and, to the extent such spectrum is available, BRS licensees in the relevant MEA? Should we give any consideration to any claims by incumbents that assigning such licenses prior to implementation of the Initiation Plan may interfere with the transition to the new band plan?

273. We also welcome comment on when to hold an auction of licenses for spectrum that is not transitioned pursuant to an Initiation Plan. In light of the potential for filing Initiation Plans any time within three years of the date of the foregoing *Report and Order,* we could not hold any such auction any earlier than three years after that date. We seek comment, however, on whether there would be any reason, other than the practical considerations of preparing to conduct an auction, for the Wireless Telecommunications Bureau to refrain from considering such an auction beginning three years after the

Report and Order.

b. Geographic Areas for New Licenses

274. In contrast to new spectrum assignments resulting from proponents' Initiation Plans, the Commission will have the flexibility to use new geographic area licensing definitions for new licenses. We propose to use Major Economic Areas as the basis for new licensing in the LBS and Upper Band Segment, and to use Economic Areas as the basis for new licensing in the MBS. We believe these proposed area definitions provide a better framework for new licensing than GSAs derived from the PSA of existing EBS and BRS licensees. The geographic limits of existing site-based licenses may limit new low or high-power services the new service rules otherwise make possible. For example, a licensee seeking to re-site a high-power transmitter and make use of the flexibility of geographic area licensing may be unable to do so if the new licensing area is closely hemmed in by other licenses. Furthermore, licensees seeking to deploy new mobile low-power service may be unable to do so if they cannot aggregate existing licenses to create a sufficient area to satisfy consumer demand for coverage.

275. *License areas for LBS and UBS spectrum.* While useable for many purposes, licenses in the Lower and Upper Band Segments authorizing low-power use offer particularly significant opportunities for providing ubiquitous mobile service. The larger the service area is, the more likely the licensee would be able to offer service anywhere that a potential customer may need it. Furthermore, licensees that choose not to serve the entire geographic area covered by the license could, subject to Commission rules, partition the license or lease spectrum rights to other parties interested in serving those areas. Finally, because the transition process adopted in the *Report and Order* is organized by MEA, using MEAs to license spectrum in the LBS and UBS may facilitate coordination with incumbents who develop MEA-based transition plans. We therefore seek comment on using MEAs for new licensing in the Upper and Lower Band Segments. We also seek comment on alternative proposals for LBS and UBS area definitions.

276. *License areas for MBS spectrum.* Licenses in the MBS authorizing high-power uses may be well suited to fixed broadcasting services, similar to existing ITFS and MDS services. Furthermore, these licenses may be of greatest interest to licensees seeking to expand services without discontinuing current service. In light of these factors, we believe that potential MBS licensees would be interested in areas larger than the PSA of an EBS or BRS license, but not necessarily much larger. Given these circumstances, license areas smaller than MEAs may meet the needs of potential MBS licensees. We therefore propose to use Economic Areas as the basis for new licensing in the MBS. We note that EAs can be aggregated into MEAs, which may facilitate coordination with incumbents who transition into MBS frequency assignments in accordance with MEA-based transition plans. We seek comment on this proposal and on alternative proposals.

277. *License areas for new licenses for previously unassigned spectrum.* Licenses for previously unassigned spectrum could be licensed based on the defined frequencies and geographic area that previously were unassigned. In addition, we could consider whether the public interest would be better served by assigning a single new license for multiple areas. Alternatively, we could make available new MEA and EA licenses, for low and high-power channels respectively, that would overlay existing licenses in MEAs subject to an Initiation Plan. These overlay licenses would encompass all previously unassigned spectrum in particular frequency blocks in the relevant geographic area. The overlay licenses would not provide any rights with respect to areas covered by other licenses but would simply clarify that any area within the MEA or EA not covered by the other licenses was the subject to the MEA or EA license. We seek comment on these alternatives, in particular on whether issuing overlay licenses as described could inadvertently create any uncertainty regarding the rights of other incumbents?

278. *License areas for relinquished spectrum.* As discussed further below, we seek comment on whether to offer incumbent licensees subject to Initiation Plans the option of relinquishing spectrum assignments pursuant to the Initiation Plan in order to participate in an alternative transition to the new band plan. Licenses for spectrum made available by any incumbents exercising this option could be licensed based on the defined geographic area of the relinquished license. In the event that incumbents relinquish multiple licenses in a single MEA subject to an Initiation Plan, we could consider whether the public interest would be better served by assigning a single new license for multiple areas. Alternatively, we could make available new MEA and EA licenses, for low and high-power channels respectively, that would overlay existing licenses in MEAs subject to an Initiation Plan. These overlay licenses would encompass all spectrum previously subject to relinquished licenses in the relevant geographic area. The overlay licenses would not provide any rights with respect to areas covered by other licenses but would simply clarify that any area within the MEA or EA not covered by the other licenses was the subject to the MEA or EA license. We seek comment on these alternatives, in particular on whether either alternative creates different incentives for incumbent licensees that might opt to participate in the alternative transition, as well as the different effects, if any, each would have on other incumbent licensees in the relevant MEA or EA. For example, would defined geographic areas or overlay licenses enhance or decrease the value of new licenses made available by opt-in licensees, thereby giving those licensees a greater incentive to relinquish licenses? Could issuing overlay licenses as described inadvertently create any uncertainty regarding the rights of other incumbents?

c. Frequency Blocks for New Licenses

279. We seek comment on the proper grouping of frequency blocks in an auction of new LBS, MBS, and UBS licenses. One option would be to license each block in each band segment separately. Alternatively, we could maintain consistency with current channel groupings by licensing three LBS or UBS blocks with an MBS block in the same groups incumbents are entitled to receive pursuant to a proponent initiated transition, *i.e.*, license an "A block" of three LBS blocks and one MBS block at the lower end of the respective segments. Should we consider grouping any EBS LBS blocks with any BRS UBS blocks? We also could group all LBS and UBS spectrum within a service as one segment, with a separate segment for all MBS spectrum within a service. We seek comment on these and other alternatives.

280. We also seek comment on whether parties seeking new licenses may be indifferent to the specific frequencies they receive, so long as they are authorized to use frequencies with particular characteristics, e.g., in particular band segments or on uniform frequencies across multiple license areas. If such indifference exists, it may be possible to allow bidders to bid within or across markets on a non-frequency specific basis. Accepting bids for new licenses based on characteristics bidders consider relevant without requiring them to specify particular frequencies could make coordination of auction bids easier and increase the likelihood of assigning the new licenses to parties that value them the most. Accordingly, we seek comment on whether potential bidders would place different values on different frequencies in the same area within the same band segment. We note that the Bureau could exercise its delegated authority regarding auction design so that bidders could be assigned uniform frequencies across markets by taking that constraint into account when the Commission assigns licenses, rather than by having the bidders bid on particular frequencies. Under this approach, if a bidder is indifferent between frequencies in the same area within the same band segment but values having the same frequency in adjacent markets, the Commission's process of assigning specific frequencies could take that into account, perhaps simply by assigning frequencies first to bidders winning across adjacent markets. We seek comment on this approach.

d. Rules for Auctions with New Licenses

281. We request comment on a number of issues relating to competitive bidding procedures that could be used to assign new licenses in this band by auction. We propose to conduct any such auction in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and substantially consistent with many of the bidding procedures that have been employed in previous auctions.[609] Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[610] Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.[611] In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[612] We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band.

e. Bidding Credits for Small Businesses and Designated Entities

282. In 1997, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[613] In addition, section 309(j)(3)(B) of the Act provides that in establishing eligibility criteria and bidding methodologies, the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[614]

283. The Commission's existing designated entity provisions apply based on an entity's qualification as a small business.[615] We note that minority and women-owned businesses and rural

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[609] *See, e.g.*, Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order*); *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part 1 Recon Order/ Fifth Report and Order* and *Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order*, 17 FCC Rcd 2962 (2002).

[610] *See* 47 C.F.R. § 1.2101 *et seq.*

[611] *See Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293; *see also Part 1 Recon Order/Fifth Report and Order*, 15 FCC Rcd 15293 (*recon. pending*) [cite check – recon pending?].

[612] *See* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55 ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part 1 Third Report and Order*).

[613] *See* 47 U.S.C. § 309(j)(4)(D).

[614] *See* 47 U.S.C. § 309(j)(3)(B).

[615] *See* 47 C.F.R. § 1.2110(a). Although the Commission previously extended designated entity preferences to minority- and women-owned businesses, as well as to small businesses, following the Supreme Court's rulings in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *United States v. Virginia, et al.*, 518 U.S. 515 (1996), the Commission concluded that it would not be appropriate to adopt special provisions for minority-owned and (continued....)

telephone companies that qualify as small businesses may take advantage of the special provisions we have adopted for small businesses.[616] We seek comment on whether our small business provisions are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies.[617] To the extent that commenters propose additional provisions to ensure participation by minority- or women-owned businesses, or rural telephone companies, they should address how such provisions should be crafted to meet the relevant constitutional standards.

284. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in the auction. With respect to the auction of EBS licenses, we further seek comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions.

285. In the *Competitive Bidding Second Memorandum Opinion and Order*, the Commission stated that it would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[618] The Part 1 Third *Report and Order*, while it standardizes many auction rules, provides that the Commission will continue a service-by-service approach to defining small businesses.[619] Generally, when establishing service-specific small business size standards, we look to the capital required to provide likely service using the spectrum. We do not know the precise type of service that new licensees may attempt to provide in this band. The Coalition has suggested that the ITFS and MDS bands may be used to provide ubiquitous broadband services using next generation low-power, cellular systems on fixed, portable and/or mobile bases.[620] We invite comment on whether likely services in this band may have capital requirements similar to current BRS services; or similar to mobile services, such as Personal Communications Services; or similar to fixed services, such as services in the 24 GHz and 39 GHz bands.

286. In the *Part 1 Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience.[621] The standard schedule appears at Section 1.2110(f)(2) of the Commission's rules.[622] Are

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women-owned businesses pending the development of a more complete record on the propriety of race- and gender-based provisions for future auctions. *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15318-20 ¶¶ 45-50 (discussing constitutional standards and governmental interests that would justify the use of race- or gender-based preferences).

[616] *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15319 ¶ 48; *see also* FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 at 29 (rel. Oct. 9, 1997) (finding that special provisions for small businesses also increase opportunities for minority- and women-owned businesses).

[617] We have issued a Notice of Inquiry seeking information about the effectiveness of our provisions to promote participation by rural telephone companies in our competitive bidding proceedings. *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, FCC 02-325 (rel. Dec. 20, 2002).

[618] Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269 ¶ 145 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); 47 C.F.R. § 1.2110(c)(1).

[619] *Part 1 Third Report and Order*, 13 FCC Rcd at 388 ¶ 18; 47 C.F.R. § 1.2110 (c)(1).

[620] *See* White Paper at 11.

[621] *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47.

these levels of bidding credits appropriate for this band? For this proceeding, we would propose to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding $15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding $3 million for the same period as an "entrepreneur."[623] In the event that we offer bidding credits on this basis, we propose to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).[624] Finally, we invite comment on the effect of potentially having three small business sizes, and bidding credits, for new licenses in this band while having had only one small business size (average annual gross revenues for the preceding three years not exceeding $40 million) and one credit (15%) in the BRS service.[625] We seek comment on this proposal.

287. We recognize that educational institutions and non-profit educational organizations eligible to hold EBS licenses may have unique characteristics. We therefore invite comment on whether distinctive characteristics of EBS licensees require distinct rules for assessing the relative size of potential participants in an auction. How do our designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to EBS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? Commenters that propose special provisions for non-profit educational institutions should address the statutory basis for such proposals. Our standard schedule of small business bidding credits provides for bidding credits based on a calculation of bidders' average annual gross revenues for the three years preceding the auction.[626] We seek comment on whether the non-commercial character of EBS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual gross revenues should be used for identifying small entities among EBS licensees and similar applicants.

288. Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services. Commenters also should consider whether the band plan and characteristics of the band suggest adoption of other small business size definitions and/or bidding credits in this instance.

2. Transitions to the New Band Plan When No Proponent Files a Timely Initiation Plan

289. Notwithstanding the Commission's rules facilitating proponent-initiated transitions to the new band plan, there may be some MEAs where potential proponents are unable or unwilling to develop a

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[622] *See* 47 C.F.R. § 1.2110(f)(2).

[623] *See* 47 C.F.R. § 1.2110(f)(2). We note that we will coordinate the small business size standards for ITFS in this proceeding with the U.S. Small Business Administration.

[624] 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[625] *See* 47 C.F.R. § 21.961(b).

[626] *See* 47 C.F.R. § 1.2110(b).

viable Initiation Plan within the allotted three-year period. Although we could extend the three-year period for filing Initiation Plans, we are concerned that this would introduce delay and uncertainty into the transition process and could frustrate successful implementation of the new band plan. We believe that in MEAs for which no Initiation Plan is submitted within the three-year period, the Commission should move the transition forward by adopting an alternative process for transitioning to the new band plan. Accordingly, with respect to such MEAs, we seek comment on the proposal detailed below, as well as on other alternatives proposed.

290. In summary, the proposal presented here calls for the Commission to adopt rules to clear current spectrum assignments from the band while preserving the incumbents' ability to access spectrum comparable in value to currently assigned spectrum. As an initial matter, incumbents would receive modified licenses to enable them to continue current operations, for the duration of the license, so long as those operations did not conflict new licensees' plans to utilize the spectrum pursuant to the new band plan.[627] Moreover, incumbents would be issued bidding offset credits to enable them to obtain spectrum licenses comparable in value to their original licenses. The proposal calls for new licenses consistent with the new band plan to be assigned by an auction open to all potentially qualified licensees. Accordingly, licenses with restricted eligibility, such as EBS licenses, could be bid on only by parties potentially meeting all the restrictions on licensees. Incumbents could use their bidding offset credits to obtain licenses comparable in value to their original licenses in this or any other Commission auction. Finally, we propose that this alternative transition process include a limited "opt-out" option for incumbents who prefer to preserve current high-power operations to the extent possible on a frequency block in the MBS, rather than to pursue the wider options available under the new band plan. New licensees whose licenses cover spectrum made available by the relocation of such opt-outs would be required to pay the incumbent's costs of relocating its operations, including any upgrade to digital transmission. We seek comment on all aspects of this proposal, as well as on all aspects of other alternatives proposed.

291. We also welcome comment on the following principles guiding the proposal outlined below, both generally and with regard to how particular aspects of the proposal, or suggested alternatives, comply or conflict with them. First, the proposal seeks to achieve the benefits of the new band plan and service rules without imposing inequitable or unnecessary burdens or disruptions on existing spectrum users and uses, or more particularly on prior Commission licensing decisions authorizing those users and uses. In this regard, the proposal need not impose any burdens or disruptions greater than those that will result from a transition to the new band plan pursuant to a proponent-sponsored Initiation Plan. Indeed, if all the incumbents in an MEA act together under the proposal, they should be able to use the bidding offset credits that they would receive to outbid any other applicants for new licenses covering all the incumbents' original spectrum assignments in their MEA. Acting together, such incumbents then could partition and disaggregate the spectrum to achieve the same result they could have achieved under a transition pursuant to a proponent's Initiation Plan. Obviously, incumbents seeking such an outcome simply should proceed with a consensus Initiation Plan. We seek comment on this alternative proposal for transitioning to the new band plan precisely because incumbents may be unable to reach consensus on an Initiation Plan. The point here is simply to illustrate that incumbents need be no worse off under this proposal than they would be under an Initiation Plan.

292. Second, the proposal to issue bidding offset credits to incumbent licensees, while somewhat different from past practice, is fundamentally similar to the Commission's prior grant of

[627] This portion of the proposal would not apply to licenses for operations on MDS channels 1 and 2/2A, which would be subject to the separate clearing procedures for that spectrum. However, the remaining element of the proposal, issuing bidding offset credits, would apply to licensees for MDS channels 1 and 2/2A.

bidding credits when assigning licenses by auction. In essence, the bidding offset credits proposed here give a bidding preference to incumbent licensees in order to limit the burdens and disruptions on existing spectrum users and use while facilitating a transition to a new band plan and new service rules. Limiting the burdens and disruptions on existing spectrum users and uses reflects the public interest in avoiding unnecessary disruptions to the Commission's licensing decisions in the public interest. The Commission's decisions to license spectrum are only the first step to achieving the public interest benefits of spectrum use. While past Commission licensing decisions are subject to review and revision, spectrum utilization is facilitated to the extent that parties utilizing spectrum are able to rely reasonably on the continued effectiveness of past Commission action licensing the spectrum. All parties, licensees and consumers, benefit when they can act in reasonable reliance on past Commission licensing action. While the benefits of the new band plan and service rules cannot be achieved without changing the status quo of existing licensees, the proposal's use of bidding offset credits preserves the existing licensees' ability to access spectrum of comparable value, and thereby serves the public interest in effective utilization of the spectrum.

293. Third, the proposal reflects the indispensable role of the Commission in the management of the public spectrum resource. The proposal makes use of market mechanisms, such as auctions, where appropriate but is not an attempt to substitute Commission action for private markets. Adoption of the new band plan and service rules; the creation of new licenses with more effective GSAs; and the assignment of licenses taking into account all potential licensees, are functions the Commission is best, and perhaps uniquely, able to achieve. The proposal attempts to incorporate all these functions in assigning new licenses for the band.

294. Fourth, the proposal reflects appropriate limits on the Commission's authority as a manager of the public spectrum resource. The proposal does not use public funds or credit to compensate licensees. The bidding offset credits that would be issued would be defined by the spectrum that would be made available in an auction of Commission licenses. As detailed below, the Commission would quantify these bidding offset credits in terms of bandwidth and covered population, and the sum total of all the bidding offset credits would be no greater than the sum total of all the licenses measured in bandwidth and covered population. While the proposal would create a process for calculating a face dollar value of those bidding offset credits, the sum total of all bidding offset credits measured in dollars would be no greater than the sum total of winning bids in an auction of licenses for the spectrum.[628]

295. The Commission always balances a variety of public interest goals when managing the spectrum or making any other decisions within its authority. Accordingly, the foregoing principles are guidelines and not absolute requirements for the process of transitioning to the new band plan.

a. Modified Licenses for Incumbents to Continue Current Operations Pending Notice from New Licensees

296. In considering any proposed mechanism for clearing spectrum in MEAs that do not develop their own transition plan, we must consider the public interest in protecting existing spectrum uses and users from needless disruption or inequitable treatment. To accomplish these objectives, we

[628] Should the Commission determine for any reason that the sum total of bidding offset credits should not exceed the sum total of net winning bids, the Commission would have to consider whether to calculate the face dollar value of bidding offset credits using net winning bids or whether to refrain from using small business bidding credits in the auction which will be used as the source of winning bids used to calculate the face dollar value of bidding offset credits.

propose to modify existing EBS and BRS licenses, with the exception of licenses for MDS channels 1 and 2/2A, so that incumbents may continue current operations until a new licensee is prepared to use spectrum pursuant to the new band plan in a manner incompatible with incumbent operations and to issue existing EBS and BRS licensees bidding offset credits that should enable them to preserve their access to spectrum of comparable value. With respect to the ability to continue current operations using current spectrum assignments, licenses for MDS channels 1 and 2/2A would be subject to the separate procedures for clearing that spectrum.

297. Under this proposal, modified licenses would authorize incumbent licensees to continue offering services on existing channels for the duration of the original license, but these rights would be secondary to those conferred by new licenses that we would issue authorizing primary access under the new band plan. This is intended to enable incumbents to continue operations until new licensees prepare to offer incompatible new service; not to enable incumbents to conduct long-term secondary operations. The modified licenses would expire at the end of their term and would not be renewed. Modifying existing licenses in this manner would effectively require incumbents to clear their current spectrum assignments when new licensees are ready to use the spectrum in ways incompatible with existing uses. We seek comment on this proposal.

298. As discussed further below, the bidding offset credits would enable incumbent EBS and BRS licensees to obtain new spectrum licenses offering spectrum access comparable in value to their existing licenses. In addition, we propose permitting incumbent licensees to transfer their bidding offset credits in whole or in part. This could enable incumbents with otherwise limited resources to finance upgrading or relocating existing facilities to take advantage of the wider options under the new band plan. We seek comment on this proposal.

299. *Geographic Areas of Modified Licenses.* The proposed modified licenses held by incumbents would have a GSA determined according to the process for converting PSAs to GSAs, with two exceptions. First, as noted above, licensees for MDS channels 1 and 2/2A would not receive modified licenses. Their continued use of current spectrum assignments would be governed by the separate process for clearing that spectrum. Second, for purposes of determining modified license rights, we propose that BRS licenses issued on a BTA basis that have not been built out as required by Commission rules in effect on the date this *Report and Order* and Further *Notice of Proposed Rulemaking* is released be treated as site-based licenses for sites in operation as of that release date. Under this proposal, post-release build-out would have no effect on the incumbent's modified license or bidding offset credit. Alternatively, BTA licensees could receive credit for post-release build-out only if the post-release build-out satisfies build-out requirements in place prior to the release date. In other words, BTA licensees would be given credit for build-out that was not completed as of the release date but that was undertaken to meet requirements existing prior to that date. We seek comment on these alternatives.

300. *Procedure for Making New Licenses Primary.* We propose the following process to determine when incumbents with modified licenses would be required to accommodate new primary licensees. We also seek comment on alternatives. We would require new licensees to provide notice to the Commission and any affected licensees of intent to commence authorized spectrum use that may interfere with modified licenses. The notice would identify the relevant new and modified licenses and certify that the new licensee has complied with Commission rules regarding service of the notice on all affected licensees and the Commission. As described in the discussion below of the option for incumbents to "opt-out" of this transition process, the notice also would be required to include a certification that the new licensee has taken certain actions to relocate "opt-out" licensees covered by the new license. In the event the Commission subsequently finds that any filed certification regarding relocation is inaccurate, the new licensee on whose behalf the certification was made shall be responsible

for all reasonably required costs incurred in the relocation, including the costs of any party arising from the inaccurate certification. Further, we propose that unlike comparable new licensees making correct certifications, a new licensee on whose behalf an incorrect certification was made would not be entitled to recover relocations costs from any other potentially responsible new licensee.

301. We would delegate authority to the Wireless Telecommunications Bureau to issue a Public Notice listing receipt of such notices from new licensees. The Public Notice listing receipt of a notice from the new licensee shall constitute constructive notice to all affected licensees. Absent the required certification, any notice shall be deemed null and void, irrespective of being listed on any Public Notice listing notices received by the Commission. One hundred and eighty (180) days after release of the Public Notice announcing the receipt of the notice or 18 months after the close of the three year period for filing Initiation Plans, whichever comes later, the new license(s) designated in the notice shall become primary to the modified license(s) designated in the notice. Prior to that time, the modified licenses would remain primary. As noted above, modified licenses shall not be eligible for renewal, irrespective of primary or secondary status, in order to assure finality regarding the transition.

302. We seek comment on this proposed notice process. Commenters are asked to discuss whether any special sanction should be imposed on secondary licensees that interfere with primary licensees and whether any sanction should be imposed on new licensees that do not commence new use within a year after filing the notice. Commenters proposing special sanctions for interference by secondary use should address the appropriate method for measuring the interference. Commenters proposing sanctions for new licensees not commencing new use should address when to evaluate the new use, the standards for such evaluation, and the most appropriate sanctions.

b. Bidding Offset Credits for Incumbents to Obtain Spectrum Licenses of Comparable Value

303. *Issuing Bidding Offset Credits.* In addition to modifying incumbent licenses as discussed above, we propose to issue existing licensees, including licensees for MDS channels 1 and 2/2A in the relevant MEAs, bidding offset credits that can be used to obtain new licenses in the 2496-2690 MHz band or auctioned licenses in any other spectrum band. We further propose that these bidding offset credits would be transferable to any other party, so that licensees would have the option of transferring them to others rather than being required to use them themselves. We seek comment on this proposal. As a threshold matter, we believe we have authority to issue the bidding offset credits. The Commission has authority to take actions necessary to execute its functions and to carry out the provisions of the Communications Act, not otherwise inconsistent with the Act. 47 U.S.C. §§ 154(i) and 303(r). The Commission's functions include management of the spectrum in the public interest, pursuant to Section 303 of the Act, and assignment of licenses to use spectrum in the public interest, pursuant to Section 309. Issuing bidding offset credits in order to protect existing spectrum uses – and past Commission public interest judgments reflected in prior licensing decisions – while clearing existing spectrum assignments is necessary to the management of spectrum in the public interest and not inconsistent with the Communications Act.

304. Effectively clearing prior spectrum assignments so that new licenses for this spectrum may be assigned by competitive bidding will promote statutory objectives.[629] Issuing bidding offset credits is within the Commission's statutory authority regarding the design of competitive bidding systems. Section 309(j)(4) of the Communications Act grants the Commission authority to consider a

[629] *See* 47 U.S.C. § 309(j)(3).

variety of methods of helping entities pay for licenses that are offered at auction, including alternative payment schedules, tax credits, and bidding preferences. The legislative history also indicates that Congress intended that Section 309(j)(4) would provide the Commission with "flexibility to utilize any combination of techniques that would serve the public interest."[630] Section 309(j)(4)(A) specifically authorizes the Commission to consider methods of payment that promote Section 309(j)(3)(B) statutory objectives of competitive bidding, which include disseminating licenses among a wide variety of applicants. Existing EBS and BRS licensees reflect in part the public interest in disseminating such licenses (particularly EBS licenses) to a wide variety of locally based licensees. Issuing bidding offset credits should ensure that such licensees can participate effectively in an auction of new licenses and thereby promotes that public interest.

305. We propose to quantify the bidding offset credits based on the bandwidth, measured in megahertz, of the incumbent's modified license multiplied by the population within the modified license's GSA. We refer to this unit of measurement as MHzPops. For licensees of MDS channels 1 and 2/2A, bidding offset credits would be based on the MHzPops of the licensee's original license. An incumbent holding a bidding offset credit for a certain amount of MHzPops could offset, *i.e.*, satisfy, some or all of a winning bid for a new license in the same service in this band covering the same population depending on the ratio between the bidding offset credit MHzPops and the new license's MHzPops. For example, suppose an incumbent held a modified EBS license for a single frequency block that entitled it to a 10 MHzPop bidding offset credit. Suppose further that a new EBS license for the same frequency block, *i.e.*, with the same bandwidth, as the incumbent's modified license covered the entire population within the incumbent's GSA as well as an equal amount of population outside the GSA, *i.e.*, reached twice the population with the same bandwidth. That new license could be measured as having 20 MHzPops. The ratio between the bidding offset credit and the new license, in terms of MHzPops, would be 1:2. Accordingly, the EBS incumbent could offset 1/2 of the winning bid, regardless of the dollar amount, for the new EBS license. Note that if the incumbent held modified licenses for two frequency blocks in the same area, it would double its bidding offset credit and have a 1:1 ratio between its bidding offset credit and the new license. Such an incumbent could offset, or satisfy, a winning bid of any amount for the new license. We propose that bidding offset credits be used in this manner only with respect to licenses in the same service, given the potential different market values of otherwise comparable spectrum, depending on the service to which it is allocated. Otherwise, licensees in one service could convert their licenses to the other service without taking into account the differences between the two. We seek comment on this proposal.

306. We further propose that incumbents be able to use their bidding offset credits to obtain spectrum licenses in new areas or different bands than those authorized by their original license. However, spectrum licenses in different areas or in different bands may differ so substantially that it would be inappropriate to offset winning bids for such spectrum licenses on a uniform MHzPops basis. Nevertheless, bidding offset credits could be used to offset winning bids for other spectrum licenses fairly and effectively if the bidding offset credit could be quantified in a generally applicable measurement of value, such as dollars, rather than MHzPops. We propose that we use an average price per MHzPops, derived from the auction for new licenses in this band, to give the bidding offset credit a face dollar value. Once given a face dollar value, bidding offset credits could be used to offset any winning bid for any

[630] P.L. 103-66, Omnibus Budget Reconciliation Act of 1993, House Report No. 103-111, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255.

Commission spectrum license, up to the face amount of the bidding offset credit.[631] In the event that we issue bidding offset credits, we propose that the Wireless Telecommunications Bureau develop procedures to advise bidders of the current projected face dollar value of their bidding offset credits during the auction of licenses in this band based on winning bids in the most recent round, so that the bidding offset credits could be used for any license in the auction. We seek comment on these proposals.

307. We also seek comment on how to determine the appropriate average price per MHzPops for quantifying bidding offset credits. For example, should we account for the fact that the new licenses permit new uses of the spectrum and may reach other population and/or use different frequencies than the original license? If so, how? Should we calculate different averages for different incumbents depending on whether the spectrum being cleared by the incumbent in exchange for the bidding offset credit is in high-power, MBS or for the low-power, lower and upper band segments?

308. We seek comment on three potential methods for calculating the value of bidding offset credits under this proposal. First, we could average the prices per MHzPops for all the related new licenses, regardless of any differences between the new licenses, and multiply the bidding offset credit's MHzPops by that average price. Like the proponent-initiated transition process, which would grant each licensee equal shares of each new band segment, this method makes no distinction among different licensees that cover the same geographic area. However, as a consequence, this method also makes no distinction between the different values for the different types of new licenses. Second, recognizing that the original ITFS or MDS license only permitted high-power use of the spectrum, we could determine the face dollar value of the licensee's bidding offset credit by multiplying the bidding offset credit's MHzPops by the average price per MHzPops for related MBS licenses permitting similar high-power use. Third, recognizing that original licensees may need to acquire LBS/UBS licenses to retain current bandwidth and that prices for such licenses may exceed MBS prices, we could multiply the bidding offset credit's MHzPops by a weighted average of the average price per MHzPops for related MBS licenses and related LBS/UBS licenses. For example, we could weight the two equally (even though there is more than three times as much LBS/UBS spectrum) by taking the mean of the average price per MHzPops for related MBS licenses and the average price per MHzPops for LBS/UBS licenses. We seek comment on these and any other alternatives for determining the average price per MHzPops to use in calculating the face dollar value of bidding offset credits.

309. Regardless of how we take into account various factors discussed above, we propose to set average prices per MHzPops for bidding offset credits issued to EBS licensees using prices for new EBS licenses and average prices per MHzPops for bidding offset credits issued to BRS licensees using prices for new BRS licenses. In this way, we can take into account the effect of restricting the parties eligible to hold EBS licensees in setting the face dollar value of bidding offset credits and leave the parties holding the bidding offset credits free to use them as they see fit.

310. As discussed above, we believe that each new MBS license will cover an entire EA and each new license for the LBS and UBS will cover an entire MEA. Consequently, each new license will

[631] For example, if the modified license authorized exclusive use of frequencies equaling 10 megahertz in a GSA with a population of 10 million, the licensee would receive a bidding offset credit for 100 million MHzPops. Subsequently, presuming the appropriate average price per MHzPops of related new licenses is $2, the bidding offset credit would have a face value of $200 million (100 MHzPops * $2 per MHzPops). A party holding the bidding offset credit could use it to offset up to $200 million of winning bids for Commission spectrum licenses. For example, if the winning bid for a new license is $150 million, the bidding offset credit could be used to offset that winning bid in entirety, while retaining a remaining face value of $50 million.

cover larger areas and different populations than the modified EBS and BRS licenses. The face dollar value of the bidding offset credit would be calculated using a uniform average price per MHzPops with respect to all population covered by the new license. Accordingly, the difference in population between the incumbent's modified license, which is the basis of the bidding offset credit's MHzPops, and the new license does not require altering the proposed process above for calculating the face dollar value of the bidding offset credit. However, EBS and BRS licenses may reach populations covered by more than one new license geographic areas. In that event, to take into account the potential differences between the average prices per MHzPops in the different new license areas, the bidding offset credit issued to the licensee would be treated as two independent bidding offset credits, one in each new license area.[632] We seek comment on this approach.

311. *Dividing and Transferring Bidding Offset Credits.* We propose that bidding offset credits should be divisible, given that parties using the bidding offset credits may be interested in a variety of licenses and that bidding offset credits are unlikely to precisely equal future winning bids. In addition, parties receiving bidding offset credits may need flexibility regarding business plans to offer spectrum-based services. We believe that such parties should be free to transfer some or all of their bidding offset credits. Because the Commission will be able to evaluate whether any transferee holding a bidding offset credit is qualified to be a licensee at the time the Commission considers a license application, the public interest in the qualifications of licensees would not be implicated by a transfer of the bidding offset credit. Moreover, permitting existing EBS and BRS licensees to transfer their bidding offset credit in whole or in part could facilitate relocating existing facilities, thus serving the public interest in avoiding unnecessary disruptions to existing services. We seek comment on whether it would be appropriate to adopt a time limit for parties to make us of the bidding offset credit, to provide definition and certainty with respect to the continued viability of the bidding offset credit or for any other reason. Finally, we do not see any reason to propose limitations on the transfer or use of bidding offset credits held by EBS licensees. The face dollar value of the bidding offset credits issued to EBS licensees would be calculated using the average price per MHzPops of new EBS licenses. Accordingly, the face dollar value of the bidding offset credit will incorporate any effect restrictions on EBS licenses may have on the price for such licenses. Therefore, we do not propose to limit subsequent use of the bidding offset credit to EBS licensees or EBS licenses. In effect, EBS licensees that do not use their bidding offset credit to obtain a new EBS license have transferred their former spectrum assignment to a new EBS-qualified licensee and are then free to use the bidding offset credit they receive as best serves their needs. The public interest reflected in the restrictions on licensees eligible to hold EBS licenses is protected by limiting new EBS licenses to qualified licensees.

312. However, in order to prevent future disputes regarding the parties that are entitled to use a bidding offset credit, we propose to require that all parties to any transfer notify the Commission of any transfer, identifying all relevant parties, and waive any claims for relief that would require returning the bidding offset credit to the transferee. Such a waiver would not require that the parties waive any claims for relief other than returning the bidding offset credit, *e.g.*, claims for monetary damages. We seek comment on this procedure generally and in particular regarding whether additional protections are

[632] For example, if a modified 10 megahertz license reaches two million people in the area covered by one new license and eight million people in the area covered by a second new license, we will treat the bidding offset credit as having 20 million MHzPops with respect to the first new license and 80 million MHzPops with respect to the second. Assume the auction results in an average price per MHzPops of $1 for the first new license and $2 for the second. The bidding offset credit have a face dollar value of $180 million ((20 million MHzPops * $1/MHzPops) + (80 million MHzPops * $2/MHzPops)) = $20 million + $160 million = $180 million). Once the face dollar value is determined, no further distinction needs to be made between the two areas reached by the modified license.

available and necessary to protect against any efforts to force returns of the bidding offset credit. Would it protect against subsequent attempts to avoid transfers in bankruptcy to require that the parties give advance notice of a transfer and only consummate the transfer after a waiting period? If so, how long should the waiting period be? Would a waiting period unnecessarily complicate transfers of bidding offset credits?

c. New Licenses and Relocation of Incumbents Opting not to Receive Modified Licenses and Bidding Offset Credits

313. *Opt-outs.* Existing licensees that only want to continue current high-power operations solely in their limited PSA/GSA may not find new licenses suitable for such uses. For example, there may be no new license covering precisely the same geographic area as the existing license. Consequently, we propose offering such licensees an opportunity to retain their GSA rather than receive a bidding offset credit to obtain a new license. In such cases, the licensee's current license would be modified in the same manner as all other licensees being cleared. The modified license would grant the licensee primary status on the relevant spectrum until a new licensee gives proper notice of incompatible new uses. The modified license then would grant the licensee secondary status for the remainder of the license term. The modified license would not be renewable. In addition, an opt-out licensee would receive a new 6 megahertz primary license for operations in its current GSA on frequencies selected by the Commission at the core of the MBS. The new license would have the same geographic area as the modified license, would have primary status, and would be eligible for renewal. We seek comment on this proposal.

314. The new band plan provides only one six megahertz block for high-power operations in the MBS for each original license in the band. Consequently, in areas subject to an proponent's Initiation Plan, incumbent licensees are entitled to only one six megahertz block in the MBS. In areas not transitioned pursuant to an Initiation Plan, incumbents that opt-out of receiving bidding offset credits in order to continue high-power operations likewise will receive a six megahertz block in the MBS. In addition, such incumbents will have others pay for their relocation. The conversion to digital transmission may enable some licensees to continue offering the same services on six megahertz that they may have offered on twenty-four, presuming they were licensed on all four channels in a group, prior to the implementation of the new band plan. As discussed below, we propose that digital facilities capable of transmitting on six megahertz the same services previously transmitted on a larger amount of bandwidth using analog facilities be considered "comparable" to such analog facilities when determining the obligations of others to pay for the incumbent's relocation. Perhaps most importantly, in areas where bidding offset credits are made available, incumbent licensees that want additional bandwidth in the MBS for high-power operations will have the opportunity to obtain it at the auction of new licenses.

315. *Financing Relocation of Opt-Outs.* We propose that the cost of relocating current licensees that opt-out should be paid by the new licensees for whose licenses spectrum is made available by the relocation. Licensees choosing to receive new MBS licenses rather than bidding offset credits may incur significant costs to relocate to the new high-power MBS. Given the non-commercial nature of EBS licensees, licensees that opt to receive a six megahertz license rather than a bidding offset credit in order to assure continuation of existing services may have difficulty financing their relocation. BRS licensees choosing to receive a new MBS license rather than a bidding offset credit also may lack capital for relocation. If we adopt the proposal to auction new licenses without designating frequency blocks until after the auction, bidders for new licenses may not know when bidding whether their specific spectrum was occupied by the relocating licensee. Given that all bidders for new licenses that encompass the geographic area covered by the original license may win frequencies covered by the original license, we propose that in such circumstances all new licensees with licenses encompassing the geographic area covered by the original license be deemed to benefit from the relocation. In the event that we accept bids

for new licenses for specific frequencies, the new licensees winning license for frequencies covered by the original license would benefit from relocation. We propose that relevant new licensees pay for the relocation of the original licensee pursuant to the procedure described below. We seek comment on this proposed procedure.

316. With respect to licensees who propose to opt-out of the bidding offset credit process and accept MBS spectrum, we propose delegating authority to the Wireless Telecommunications Bureau to announce a date for such licensees to file a relocation plan. The date for filing shall be at least sixty (60) days prior to the start of any auction for new licenses in this band. In the filing, relocating licensees would provide a detailed proposal setting forth all actions reasonably required to relocate their current facilities or construct comparable new facilities consistent with the new MBS license. In light of the limited availability of MBS spectrum and the need for relocating licensees to make due with less bandwidth, we propose that digital transmission facilities capable of carrying the same number channels previously carried by the licensee on four analog channels be considered comparable to the analog transmission facilities. The proposal would itemize the cost of each action to be taken, and would document costs already incurred. We seek comment on this proposed approach.

317. We also propose that relocating licensees be able to relocate themselves and subsequently seek reimbursement from new licensees. Itemized costs related to relocation that the licensee incurs prior to the date of filing shall be deemed reasonably required. Itemized costs related to relocation that the licensee incurs after the date of filing that are less than or equal to the estimates provided in the filed relocation plan shall be deemed reasonably required but subject to review. Costs related to relocation that the licensee incurs after the date of filing that exceed the estimates provided in the filed plan shall be deemed not reasonably required and are not recoverable.

318. Further, we propose that new licensees holding licenses that encompass the geographic area of any relocated license would be required to certify to the Commission that they have taken reasonably required actions to relocate the affected licensee and that the relocated licensee has been reimbursed for all reasonably required relocation costs that it incurred. Such certifications would be required to detail all actions taken in this regard. Reimbursement would include any reasonably required costs subject to review, unless such costs were determined by binding arbitration to be not reasonably required as part of the relocation. We propose that if the Commission should find relocated licensees unreasonably refused to submit to binding arbitration, the relocating licensee would not be entitled to recover any costs subject to review. In the event that affected licensees do not relocate themselves, new licensees would be required to relocate them by taking the actions set forth in the filed relocation plan, paying the cost of such relocation up to one hundred and twenty percent (120%) of the estimate provided in the plan. No new licensee would have any obligation to relocate the affected licensee or pay any relocation costs to the relocated licensee once any responsible new licensee certifies that it has paid reasonably required relocation costs of one hundred and twenty percent (120%) of the estimate provided in the plan.

319. Absent the required certification, we propose that any notice of intent to commence new operations pursuant to the license that may conflict with existing uses would be deemed null and void, regardless of whether it is inadvertently listed on any Public Notice listing notices received by the Commission. In the event the Commission subsequently found that any filed certification is inaccurate, we propose that the new licensee on whose behalf the certification was made would be held responsible for all reasonably required costs incurred in the process of relocation irrespective of the estimates in the filed relocation plan, including the costs of any party arising from the inaccurate certification. Under this proposal, such a new licensee would not be entitled to recover any amounts it pays from any other new licensee responsible for relocation costs. With the exception of any responsible new licensee that files an

inaccurate certification regarding relocation, we propose that any responsible new licensee paying more than the fraction of the recoverable relocation costs equal to the new licensee's fraction of bandwidth made available in the area in the auction would be entitled to recover excess amounts from any other responsible new licensee that has not previously paid its own fractional share.

B. Performance Requirements

320. *Background.* In the *NPRM*, we sought comment on what performance requirements should be applicable to MDS BTA authorization holders and site-based MDS and ITFS licensees.[633] Given our decisions to adopt geographic area licensing for these services,[634] and to eliminate forfeiture, cancellation, and discontinuance of service rules for certain BRS and EBS licensees,[635] we conclude that it is necessary to review performance requirements for these services as well. Because these standards exist in order to encourage licensees to build out wireless facilities, we sought comment specifically on whether the existing benchmarks were adequate or whether these standards actually frustrated licensees' abilities to deploy service quickly and efficiently.[636] As noted in the *NPRM*, the Commission has been willing to entertain "substantial service" as a flexible, alternative approach that fulfills our goal of promoting innovation and development by maximizing flexibility in the service rules.[637] Many commenters favor this standard, offering that a substantial service approach is a better alternative to current static build-out requirements, which follow fixed time-schedules.[638] We also sought comment in the *NPRM* as to the appropriate method for conducting a substantial service analysis, including what factors a licensee may use to demonstrate substantial service including "safe harbors".[639]

321. The Commission seeks to prescribe performance requirements that serve "to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[640] Additionally, we seek to promote the availability of broadband to all Americans, including broadband

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[633] *NPRM*, 18 FCC Rcd at 6799-6804 ¶¶ 190-198.

[634] *See* Section *IV.A.4*, *supra*.

[635] See Section IV.D.11, *supra*.

[636] *See NPRM*, 18 FCC Rcd at 6799 ¶ 190.

[637] *See NPRM*, 18 FCC Rcd at 6800 ¶ 191. *See also*, Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16951 ¶ 37 (2000) (*24 GHz Report and Order*) ("Based on the record in this proceeding, we believe that the substantial service standard, in lieu of specific coverage requirements best serves the public interest. In addition to being consistent with the approach used in other wireless services, we believe that this standard is sufficiently flexible to foster expeditious development and deployment of systems and will ultimately create competition among service providers in this band.").

[638] *See NPRM*, 18 FCC Rcd at 6802 ¶ 193. The most important construction requirements currently applicable to MDS BTA authorization holders are that such licensee has a five-year build-out period, beginning on the date of the grant of authorization, and in that time the licensee must construct stations that will provide service signals to at least two-thirds of the population of the applicable service area. *See generally* 47 C.F.R. § 21.930. Site-based MDS licensees must construct their facilities within twelve months of the date of their grant. *See* 47 C.F.R. § 21.43. Site-based ITFS licensees must construct their facilities within eighteen months of following the issuance of their construction permit. *See* 47 C.F.R. § 73.3534.

[639] *See NPRM*, 18 FCC Rcd at 6800, 6802-03 ¶¶ 191, 193-97.

[640] 47 USC §309(j)(4)(B).

technologies for educators, and to encourage the highest valued use of radio licenses and promote the economic viability of services in this band by ensuring that the spectrum is as fungible, tradable, and marketable as possible. Thus, in order to accomplish these goals, we believe a market-oriented approach to spectrum policy best ensures the build-out of wireless facilities and broader provision of wireless services.[641] We believe that economic forces will guide competing providers to innovate and broaden deployment of services. To this end, we aim to provide licensees greater flexibility "to tailor the use of their spectrum to unique business plans and needs."[642] We believe that establishing more flexible rules will result in ubiquitous, high-quality service to the public and at the same time encourage investment by increasing the value of licenses. We believe more flexible rules will make licensees more economically viable and will provide incumbents with reasonable opportunities to continue their current uses of the spectrum. We believe flexible rules will also facilitate speedier transition and deployment in the band. For the reasons discussed herein, we tentatively conclude that performance requirements based on the substantial service standard set forth in Part 27 of our Rules[643] will provide the strongest incentives to licensees to develop and deploy new services. We seek comment on specific safe harbors that will satisfy the substantial service requirements tentatively adopted for BRS and EBS services.

322. "'Substantial' service is defined in Part 27 of our Rules as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."[644] The Commission has implemented substantial service requirements for other wireless services.[645] Among our goals, we seek to clarify and stabilize the regulatory treatment of similar spectrum-based services. Thus, we believe that adopting substantial service performance requirements for BRS and EBS services will create regulatory parity between these services and other wireless services.[646] And "[w]hile the definition of substantial service is generally consistent among wireless services, the factors that the Commission will consider when determining if a license has met the standard vary among services."[647] We believe that within a substantial service framework, refined measures may be adopted to suit any challenges that BRS and EBS licensees face in development and deployment. Our decision to

[641] *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Proposed Rulemaking*, 18 FCC Rcd 20802, 20819 ¶ 34 (2003) (*Rural NPRM*).

[642] *See Rural NPRM*, 18 FCC Rcd at 20819 ¶ 34.

[643] *See* 47 C.F.R. § 27.14(a) (2004).

[644] 47 C.F.R. § 27.14(a).

[645] *See, e.g., Rural NPRM*, 18 FCC Rcd at 20819 ¶ 34 ("In more recently adopted rules for wireless services, such as our Part 27 rules for private services, Lower and Upper 700 MHz, 39 GHz, and 24 GHz, the Commission established the substantial service standard as the only construction requirement."). *See also* Coalition Proposal at 44. ("There is ample precedent for [a substantial service] approach as the Commission has adopted this very same requirement for operate at 2.3 GHz, the Upper 700 MHz band, the Lower 700 MHz band, the paired 1392-1395 MHz and 1432-1435 MHz bands or the unpaired 1390-1392 MHz, 1670-1675 MHz and 2385-2390 MHz bands.").

[646] *See also Rural NPRM*, 18 FCC Rcd at 20821-22 ¶ 37-38. *See also 24 GHz Report and Order, supra* note 5, at 16951 ¶ 37.

[647] *See Rural NPRM*, 18 FCC Rcd at 20819 ¶ 32. "For example, in some wireless services, the Commission indicated that licensees providing niche, specialized, or technologically sophisticated services may be considered to be providing 'substantial service.' In other services, the Commission has indicated that licensees providing an offering that does not cover large geographic areas or population..., but nonetheless provides a benefit to consumers, also may meet the standard." *Id.* at n.75 (citations omitted).

shift to geographic area licensing for BRS and EBS services is in part based on the need to provide flexibility to licensees so as to encourage efficient use of the fullest capacity of allotted spectrum.[648] We believe that implementing substantial service performance requirements will also promote flexibility and thus allow licensees to provide quality, widespread services to the public.

323. We believe that construction benchmarks focusing solely on population served or geography covered do not necessarily reflect the most important underlying goal of ensuring public access to quality, widespread service.[649] For example, such requirements alone do not take into account qualitative factors important to end-users and the market such as reliability of service, and the availability of technologically sophisticated premium services.[650] While it may be argued that market forces ensure a requisite level of quality in the services reaching consumers, this is not always the case. We seek input on factors that can be used as indicia to satisfy safe harbors under substantial service.

324. We further believe that fixed, inflexible construction requirements hinder widespread deployment of wireless services and do not always reflect elements of service such as cost or, more importantly, populations served. At the least, in some instances, fixed construction requirements do not easily permit the Commission to measure the deployment of service by a licensee.[651] As we have noted, merely satisfying such benchmarks does not necessarily demonstrate adequate deployment in rural areas, to niche markets, or to discrete populations or regions with special needs.[652] We believe that a standard based on substantial service is better able to respond to these various concerns. We agree with commenters and believe that a shift towards a substantial service standard will help encourage licensees to provide the best possible service and avoid "construction...solely to meet regulatory requirements rather

[648] *See* Section IV.A.4 *supra*.

[649] *See NPRM*, 18 FCC Rcd at 6803 ¶ 195 ("[F]ocusing solely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the licensee is providing adequate service to the public."). *See also Rural NPRM*, 18 FCC Rcd at 20820 ¶ 35 ("[G]iven the unique characteristics and considerations inherent in constructing within rural areas, we believe that applying an inflexible construction standard that is based upon coverage of a requisite percentage of an area's population may be an inappropriate measure of levels of rural construction.").

[650] *See, e.g.*, Nextel Reply Comments at 15-16 ("[A] substantial service standard will provide licensees greater flexibility to determine how best to implement their business plans based on criteria demonstrating actual service to end users, rather than on a showing of whether a licensee passes a certain portion of the relevant population."). *See also*, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order*, 10 FCC Rcd 6884 ¶ 41 (1995) (*900 MHz Second Report and Order*) ("We also conclude that a showing of "substantial service" is appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services.").

[651] The Commission has recognized that because certain types of services and technologies do not lend themselves to compliance with strict construction requirements, they are better gauged based upon a substantial service requirement. For example, fixed, point-to-point operations provide service in a linear manner, making a coverage area calculation inapplicable. *See, e.g.*, Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943 ¶ 156 (1997).

[652] *See Rural NPRM*, 18 FCC Rcd at 20820 ¶ 35; *see also* Coalition Proposal at 45.

than market conditions."[653]

325. The Coalition argues that substantial service standards would allow the Commission to evaluate a licensee's entire system of stations, rather than each station's service standing alone.[654] This is important and relatively unique in the context of MDS and ITFS service, according to the Coalition, because MDS and ITFS providers, unlike those providing most other services, will use channels combined from a variety of sources.[655] Thus, the Coalition asks us to "recognize that in some cases a licensee may not use particular spectrum covered by one license, or certain channels authorized by a license, that is part of a larger operating system" because the licensee is using the spectrum in some other way still critical to the system's overall design.[656] In other words, a system otherwise providing substantial service may yet necessitate limited cases of what appears to be warehousing.[657] The Coalition also argues that system operators may not build out some spectrum so that it can be held for future uses demanded by the market.[658] Finally, the Coalition and other commenters argue that licensees may focus portions of their service to particular constituents rather than the general population of the GSA.[659] For these many reasons, the Coalition not only supports substantial service requirements over fixed benchmarks, but recommends that Commission evaluations under this standard proceed case-by-case, looking at the overall service of one parent provider/licensee as opposed to the adequacy of service within a single service area.[660] We see merit in at least some of these arguments; however, we do not plan to proceed on a case-by-case basis in determining whether substantial service has been met. Rather, as discussed below, we instead seek comment on specific safe harbors that will meet the proposed substantial service standard for BRS and EBS services.

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[653] SBC asserts that construction requirements "likely would result in the construction of facilities solely to meet regulatory requirements rather than market conditions," possibly causing facilities to be "constructed inefficiently, and guided more by regulatory necessity than the need to provide least-cost service to consumers." *See* SBC Reply Comments at 11. SBC says the consequence would be unnecessarily high rates. *See* SBC Reply Comments at 11. Finally, SBC argues that fixed construction benchmarks would be inconsistent with the pro-competitive policies of the Act, handicapping new entrants into the broadband services market. *See* SBC Reply Comments at 11. We acknowledge that one of our goals is to encourage competition in wireless broadband by creating new opportunities for new entrants. Thus, SBC supports a substantial service standard for these primary reasons. *See* SBC Reply Comments at 12.

[654] *NPRM,* 18 FCC Rcd at 6803 ¶ 195; *see also* Coalition Proposal at 45.

[655] *See NPRM,* 18 FCC Rcd at 6803 ¶ 195 (citing Coalition Proposal at 35, "MDS/ITFS may pull spectrum from "their own BTA authorized stations, incumbent MDS stations they own, and leased capacity of MDS and ITFS stations licensed to others.")

[656] *NPRM,* 18 FCC Rcd at 6803 ¶ 195; *see* Coalition Proposal at 45.

[657] IPWireless is in apparent agreement with the Coalition that some spectrum could permissibly be used as guard band and still be considered a valid part of a licensee's commercial service. *See* IPWireless Reply Comments at 7; *see also* Sprint Comments at 17. However, the IPWireless response cautions some qualification: "Spectrum used to provide any guard bands necessary to conform to the rules, consistent with sound engineering practices, should be counted as having been placed in commercial service. [However, t]he term 'commercial service' should be limited to direct links between a carrier's network and one or more end users/subscribers." IPWireless Reply Comments at 7.

[658] *NPRM,* 18 FCC Rcd at 6803 ¶ 196; *see* Coalition Proposal at 46.

[659] *Id.*

[660] *Id.* at 6803 ¶ 197; *see* Coalition Proposal at 46.

326. Many commenters favor a substantial service standard for geographically-licensed MDS and ITFS operators. Sprint agrees with the Coalition that a substantial service performance standard will best suit the MDS/ITFS regulatory scheme, "particularly as the centerpiece to this model is likely to be flexible use within a geographic area."[661] Likewise, BellSouth "wholeheartedly" supports this standard and takes the position that alternative standards proposed by a few commenters "would not solve the problems associated with the existing patchwork of rules."[662] EarthLink, Rural Commenters, AHMLC, and HITN, among other commenters, also support a substantial service standard.[663]

327. Not all commenters, however, appear to support a substantial service performance requirement. We note that NTCA supports construction benchmarks, particularly for those larger carriers obtaining licenses for large geographic areas.[664] IPWireless agrees and recommends "stringent construction and operation requirements" to prevent warehousing of spectrum by MMDS and ITFS licensees.[665] To that effect, IPWireless suggests the following fixed benchmarks: MMDS licensees and other operators leasing MMDS spectrum should be required to provide commercial service to at least one community within 36 months, and should build and operate a system capable of serving 1/3 of the GSA population within 48 months and 2/3 of the population within 60 months.[666]

328. We recognize the importance of fixed benchmarks and timetables as incentives to quickly deploy service and avoid spectrum warehousing. We suggest, however, that benchmarks may yet be assimilated into the substantial service framework as safe harbors, rather than as goals unto themselves. We invited comment in the *NPRM* regarding whether we should adopt 'safe harbors' to complement the proposed substantial service approach.[667] Most commenters responded positively regarding the substantial service approach proposed in the *NPRM*. Responses regarding safe harbors were similarly favorable, but were vague. We now seek comment on specific safe harbors that will meet the substantial service standard we have tentatively adopted for BRS and EBS services. For example, we seek comment on whether construction requirements such as those proposed by IPWireless above would be suitable as a safe harbor to meet the substantial service standard. We seek comment on what other specific safe harbors – in addition to or apart from these – may be appropriate. Finally, we seek comment on whether licensees' existing benchmarks, if met, should be available methods of demonstrating substantial

[661] *See* Sprint Comments at 16.

[662] *See* BellSouth Reply Comments at 22.

[663] *See* EarthLink Comments at 8-9; *see* Rural Commenters Reply Comments at 3; *see* AHMLC Comments at 24; *see* HITN Comments at 8 n..8.

[664] *See* NTCA Comments at 7. Many commenters are concerned that stringent construction requirements put small carriers at greater disadvantage, especially as such benchmarks regard rural service. *See, e.g.*, NTCA Comments at 7.

[665] *See* IPWireless Reply Comments at 6.

[666] IPWireless Reply Comments at 6. IPWireless notes that "[t]he proposed requirements are generally based upon those already existing in other services, including broadband Personal Communications Service (47 CFR §24.203 "Construction requirements") and the Cellular Radiotelephone Service (47 CFR §22.947 "Five year build-out period")." IPWireless Reply Comments at n.9.

[667] *NPRM*, 18 FCC Rcd at 6801 ¶ 191. We also sought comment on safe harbors in the *Rural NPRM*, another proceeding that affects MDS and ITFS licensees as well as other service-specific licensees. *See Rural NPRM*, 18 FCC Rcd at 20824 ¶ 41.

service.[668]

329. Finally, rural build out remains an important concern to us. We recognize that, "as a result of varying technical and demographics, the economics of providing service can be significantly different in rural areas as compared to urban areas."[669] With respect to rural areas, we recognize that "market characteristics, especially demographics, will affect the optimal market structure."[670] Various commenters echo these concerns.[671] In the *NPRM* we sought comment on ways in which our construction benchmarks could be modified to better promote service to rural areas.[672]

330. We seek comment on whether there should be rural-specific safe harbors within the substantial service framework to encourage rural build out. For example, in the Rural *NPRM*, we suggested two safe harbors for rural service.[673] The first, available to licensees providing mobile wireless services, proposed that licensees "will be deemed to have met the substantial service requirement if it provides coverage, through construction or lease, to at least 75 percent of the geographic area of at least 20 percent of the 'rural' counties within its licensed area."[674] For fixed services, we proposed a safe harbor that would consider a licensee to have met the substantial service requirement if the licensee, "through construction or lease, constructs at least one end of a permanent link in at least 20 percent of the 'rural' counties within its licensed area."[675] We seek comment on whether meeting these requirements would be appropriate methods for rural carriers to satisfy safe harbors and satisfy the substantial service standard.

331. Grand Wireless proposes the following fixed construction benchmarks: licensees should be required to cover 30 percent of their rural area population within two years, 50 percent within four years, 70 percent within six years, and 80 percent within eight years.[676] We seek comment, however, on the fitness of these requirements as one way to satisfy a safe harbor, as opposed to using these percentages as fixed construction benchmarks. We seek comment on rural-specific safe harbors.

332. In the *NPRM*, we sought comment on how to define a rural service area.[677] We now note

[668] *See* n.638, *supra*. *See also* 47 C.F.R. § 27.930 (MDS BTA authorization holders), 47 C.F.R. § 21.43 (site-based MDS licensees), 47 C.F.R. § 73.3534 (site-based ITFS licensees). *See also Rural NPRM*, 18 FCC Rcd at 20824 ¶ 41 ("We note that these proposed 'safe harbors' are intended to provide licensees with a measure of certainty in determining whether they are providing substantial service, but are not intended to be the only means of demonstrating substantial service. Accordingly, a licensee may still satisfy a 'substantial service' standard without complying with one of the safe harbors.").

[669] *Rural NPRM*, 18 FCC Rcd at 20807 ¶ 7.

[670] *Id.*

[671] *See* NTCA Comments at 7, Grand Wireless Commments at 13- 14, IP Wireless Comments at 23, Pace Comments at 1, 9.

[672] *See NPRM*, 18 FCC Rcd at 6803-04 ¶ 198.

[673] *See Rural NPRM*, 18 FCC Rcd at 20824 ¶ 41; *see also* n. 667 *supra*.

[674] *Rural NPRM*, 18 FCC Rcd at 20824 ¶ 41.

[675] *Id.*

[676] *See* Grand Wireless Comments at 14.

[677] *See NPRM*, 18 FCC Rcd at 6804 ¶ 198.

that this issue is taken up in the *Rural NPRM*, where it was noted that various definitions of "rural" have been utilized by federal agencies generally and the Commission specifically.[678] While the Communications Act directs the Commission to promote the development and deployment of services to rural areas, the Act did not provide a specific definition of rural areas.[679] We have not previously clarified and adopted a definition for rural area, but have rather allowed the term to vary "depending on the particular regulatory initiative at issue."[680] We seek additional comment on the following definitions of rural area proposed in the *Rural NPRM*: (1) counties with a population density of 100 persons or fewer per square mile; (2) RSAs; (3) non-nodal counties within an EA; (4) the definition for "rural" used by the RUS for its broadband program; (5) the definition for "rural area" used by the Commission in connection with universal service support for schools, libraries, and rural health care providers; (6) the definition of "rural" based on census tracts as outlined by the Economics Research Service of the USDA; (7) the Census Bureau definition of "rural" counties; and (8) any census tract that is not within ten miles of any incorporated or census-designated place containing more than 2,500 people, and its not within a county or county equivalent which has an overall population density of more than 500 persons per square mile of land.[681]

C. Grandfathered E and F Channel ITFS Stations

333. In 1983, the Commission redesignated the E and F Group ITFS channels from the ITFS service to MDS usage.[682] The Commission took this action in an effort to spur the development of MDS to promote effective and intense utilization of the spectrum leading to its highest valued use.[683] As part of its decision, the Commission grandfathered ITFS licensees operating on the E Group and F Group channels subject to the following limitations:

> Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.[684]

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[678] *See Rural NPRM*, 18 FCC Rcd at 20808 ¶ 10.

[679] *See generally*, 47 U.S.C. §§ 151, 309(j)(3)-(4).

[680] *Rural NPRM*, 18 FCC Rcd at 20808 ¶ 10.

[681] *See Rural NPRM*, 18 FCC Rcd at 20808 ¶ 10. Note that for this proceeding, we take the same position held in the *Rural NPRM* that any definition of "rural area" that is adopted for the purposes of the current proceeding will not affect the definition of rural in other contexts. *See id.* at 20808 nn.24, 41.

[682] *See* In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*E and F Group Reallocation Order*).

[683] *Id.* at 1228-29 ¶¶ 61-63.

[684] *See* In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum* (continued....)

The Commission stated that "there may be instances where the natural evolution of an ITFS station may reasonably require the addition of receive stations without changing the nature or the scope of the ITFS operation" that would justify the addition of additional receive sites.[685] In those instances, the Commission stated that the grandfathered ITFS licensee could request a waiver of Section 74.902(c).[686] Our rules provide that "in those areas where Multipoint Distribution Service use of these channels is allowed, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful co-channel and adjacent channel interference from Multipoint Distribution Service stations."[687]

334. Commenters in the present proceeding raised the issue of the proper future treatment of grandfathered E and F group ITFS licensees.[688] Grand Alliance argues that the Commission must be fair in establishing the rights of grandfathered MDS licensees on the E and F group channels pending the resolution of overlapping service areas with other MDS licensees, protecting any co-channel pre-1983 ITFS receive sites.[689] Grand Alliance asserts that co-channel licensees should not be afforded new rights protecting new receive sites, or, as suggested by the Coalition, have any technical or other restrictions on their grandfathered operations lifted.[690] Grand Alliance reasons that other conclusions would be inconsistent with the Commission's stated intent in the original orders reallocating the E and F channels to MDS and "freezing" incumbent ITFS operations on those channels.[691]

335. In response, the Department of Education, Archdiocese of New York (DOEANY) states that Grand Alliance's argument effectively ignores the Commission's determination extending protected service areas to all ITFS licensees, including E and F Group licensees, embodied in Section 74.903(d) of the Commission's Rules, which states that ITFS licensees "must be protected from harmful electrical interference at each of [their] receive sites registered previously as of September 17, 1998, and within a PSA."[692] Stanford, Northeastern University, and the Diocese of Brooklyn further argue that Grand Alliance's proposal expands the rights of E/F Channel MDS licensees and revokes existing spectrum rights of grandfathered E/F Channel ITFS stations.[693] Region 10 argues that registered grandfathered receive sites should always be protected, including those outside current PSA boundaries.[694]

(Continued from previous page) ———————————
Opinion and Order on Reconsideration, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*). *See also* 47 C.F.R. § 74.902(c).

[685] *See E and F Group Reallocation Reconsideration Order,* 98 FCC 2d at 132-33 ¶ 12 nn. 7, 8.

[686] *Id.*

[687] 47 C.F.R. § 74.902(c).

[688] See Grand Alliance Comments, DOEANY Reply Comments, Stanford & Northeastern Reply Comments, Brooklyn Reply Comments, and Coalition Reply Comments at 93-96.

[689] *See* Grand Alliance Comments at 9.

[690] *See* Grand Alliance Comments at 9

[691] *See* Grand Alliance Comments at 9-10.

[692] *See* DOEANY Reply Comments at 1. Stanford, Northeastern University, and the Diocese of Brooklyn argue that Grand Alliance's proposal expands the rights of E/F Channel MDS licensees and revokes existing spectrum rights of grandfathered E/F Channel ITFS stations. *See* Stanford, Northeastern and Brooklyn Reply Comments at 5-6.

[693] *See* Stanford, Northeastern and Brooklyn Reply Comments at 5-6.

[694] Region 10 Comments at 9; *see NPRM* at 6758-59 ¶ 88.

336. If grandfathered E and F Group ITFS licensees are not permitted to modify their equipment and MDS licensees must continue operating on a secondary basis, grandfathered E and F Group ITFS licensees will cause interference to low-power MDS co-channel licensees in some markets. Put another way, if MDS licensees that are on co-channel frequencies with grandfathered E and F Group ITFS licensees must avoid interfering with these frozen licensees, then the deployment of MDS broadband services may be hindered. Additionally, the grandfathered E and F Group ITFS licensees will never be able to transition to a low-power cellularized broadband system due to the restriction on modifying their equipment, which is presently contained in our rules.

337. We seek comment on how to modify our rules concerning grandfathered E and F channel ITFS stations in order to equitably allow both MDS and ITFS stations to provide advanced broadband wireless services. We ask whether it makes sense to adopt different approaches to different scenarios, rather then a one size fits all approach.

338. The first scenario that we envision is where the PSA of the grandfathered E and F Group ITFS licensee almost entirely overlaps the PSA of the co-channel MDS licensee. In this scenario, we seek comment on whether in keeping with the intent and spirit of the Commission's 1983 *E and F Group Reallocation Order* to free up spectrum for MDS,[695] we should require grandfathered E and F Group ITFS licensees to operate on a secondary non-interference basis to the co-channel MDS licensee. In the *E and F Group Reallocation Order*, the Commission stated that the two major public interest arguments favoring the authorization of multichannel MDS are efficiency and flexibility,[696] which are goals in the present proceeding in achieving the availability of new broadband technologies to all Americans as quickly as possible. If the grandfathered E and F Group ITFS licensees are to operate on a secondary non-interference basis to the co-channel MDS licensees we seek comment on whether the MDS licensees should bear the cost of relocating and/or coming to some other mutual arrangement with the grandfathered ITFS licensees that will adequately address the grandfathered ITFS licensees' concerns about being able to continue their operations.

339. Alternatively, we seek comment on allowing grandfathered E and F Group ITFS licensees to modify their equipment and be given a GSA, while the co-channel MDS operators would have to operate on a secondary non-interference basis. The *E and F Group Reallocation Order* seems to suggest that the Commission's intent in 1983 was to grandfather the E and F Group ITFS licensees forever. The Commission stated that "[e]xisting ITFS licensees (as well as existing permittees and applicants that eventually become licensees) of the reallocated channels would be grandfathered in perpetuity."[697]

340. A third approach would be to rely on voluntary negotiations between the parties. The Commission stated in 1983 that "[it] expect[s] that the MDS permittees and the ITFS users of the reallocated channels will negotiate in good faith to mutually accommodate each others' communications requirements."[698] Given the lack of progress in some markets between co-channel MDS licensee and grandfathered E and F Group ITFS licensee, we question whether continued reliance on negotiations would be appropriate. Nevertheless, we seek comment on whether there are changes we could make to

[695] *See E and F Group Reallocation Order*, 94 FCC 2d at 1228-29 ¶¶ 61 - 63.

[696] *Id.*

[697] *See id.* at 1247-8 ¶ 110.

[698] *See id.* at 1247-8 ¶ 110

our rules that could make negotiations more effective.

341. The second scenario we envision is where the PSAs of the grandfathered E and F Group ITFS licensees overlap to some extent, but not as much as the in scenario one. We seek comment on whether, in that situation, we should adopt the same "splitting the football" mechanism we are using to separate other overlapping PSAs.[699] If we adopted that approach, co-channel MDS licensees and grandfathered E and F Group ITFS licensees would draw a boundary line through a "football" shaped area where the PSAs intersect, with each licensee agreeing to limit the interference it generates across the boundary and getting a GSA based on its prior PSA. We seek comment on whether this same approach makes sense in the co-channel BRS and grandfathered E and F Group ITFS licensee scenario as well. We also seek comment on the maximum amount of overlap under which the "splitting the football" approach would be practical.

342. We also seek comment on whether, as suggested by DOEANY and Region 10, we should continue to afford protection to grandfathered ITFS E and F group receive sites that fall outside the new GSAs. We note that in other contexts, we have declined to protect receive sites outside GSAs. We seek comment on whether there is any reason to treat grandfathered E and F channel ITFS stations differently.

343. Finally, the third and last scenario we envision is that where the grandfathered E and F Group ITFS licensee remains frozen, unable to modify its system, and there is no co-channel MDS licensee. We seek comment on allowing the grandfathered E and F Group ITFS licensee to modify and to assign their facilities where there is no co-channel MDS licensee. We believe that allowing such freedom may facilitate innovative new educational broadband service offerings.

D. Limitation on Channel Assignments for EBS Licensees

344. Section 74.902(d)(1) of the Commission's Rules (the Four-Channel Rule) limits a licensee "to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same [channel] Group . . . ."[700] The rules prohibit applicants from reserving additional channels by applying for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels.[701] Rather, the number of channels authorized to an applicant must be based on the demonstration that the licensee needs the number of channels requested.[702] In making such an assessment, the Commission considers such factors as the amount of use of any currently assigned channels and the amount or proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community.[703]

345. We note that the transition plan we have adopted today contemplates situations that would be inconsistent with continued application of the four-channel rule. For example, an ITFS licensee that wished to continue high-power operations using four channels in the MBS could receive the high-power channel in four different channel groups, which under our current rules would be prohibited.

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[699] *See* discussion of splitting of the football and geographic area licensing in general at Section IV.A.4.b, *supra.*

[700] 47 C.F.R. § 74.902(d)(1) (1993).

[701] *Id.*

[702] *Id.*

[703] *Id.*

Because the record demonstrates a significant level of support for the Coalition's transition plan, including the ability to "swap" channels with other licensees in the same geographic region, we believe that the record supports our decision not to apply the four-channel rule in those areas that have transitioned. No party argued that the Coalition's transition plan was inappropriate because it would require changes to the four-channel rule. Accordingly, we conclude that the four-channel rule does not apply in those MEAs that have transitioned.

346. We seek comment on eliminating the four-channel rule in markets that have not yet transitioned. The purpose of the four-channel rule has been "to provide as many educators as possible with the opportunity to operate ITFS systems that meet their educational needs."[704] At the time the four-channel rule was established, ITFS was limited to video broadcast uses. Given the wider range of services that ITFS can now be used for and the changes to our leasing rules, it appears that the four-channel rule may unduly limit the ability of educational institutions and organizations to take full advantage of the potential of ITFS. We are also concerned that the four-channel rule may require that spectrum lay fallow when an educator wishes to use the spectrum. Furthermore, in those markets where all ITFS spectrum is assigned, the four-channel rule may artificially limit the ability to assign spectrum to educators who are in a better position than the existing licensee to utilize the spectrum. Commenters supporting retention of the four-channel rule should explain why they believe the rule is appropriate and necessary given the current market and regulatory conditions.

E. Wireless Cable Exception to EBS Eligibility Restrictions

347. In 1990, the Commission initiated a proceeding to review and simplify disparate technical, procedural, ownership and other requirements and restrictions in the three microwave radio services used in the provision of wireless cable service – MDS, ITFS, and OFS.[705] By affording wireless cable operators a more accommodating regulatory framework, the Commission aimed to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace. At the same time, the Commission wished to ensure that ITFS continued to be a useful tool for providing educational opportunities.[706]

348. As part of the Commission's effort to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace, the Commission proposed to allow wireless cable entities to be licensed on vacant ITFS channels under certain circumstances. On October

[704] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd 2907, 2914 ¶ 39 (1995).

[705] *See* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792 at ¶ 1 (1990) (*Second Report and Order*) (citing Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket Nos. 90-54 and 90-113, *Notice of Proposed Rule Making and Notice of Inquiry*, 5 FCC Rcd 971 (1990)).

[706] *Second Report and Order* at ¶ 1 (citing Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, Gen. Docket Nos. 90-54 and 90-113, *Report and Order*, 5 FCC Rcd 6410 (1990).

25, 1991, the Commission adopted a proposal to permit use of available ITFS channels by wireless cable entities.[707] This proposal was implemented in the *Second Report and Order* as Section 74.990 of the Commission's Rules. In order to ensure that wireless cable use did not have a negative impact upon ITFS, the Commission established a series of requirements that must be met before ITFS channels could be used for wireless cable use.[708] In order for commercial operators to take advantage of ITFS frequencies, at least 8 ITFS channels must remain available in the community.[709] Also, there can be no co-channel ITFS station within 50 miles of the proposed system.[710] If an ITFS applicant applies at the same time as the commercial operator, the ITFS applicant automatically wins.[711]

349. Although we sought comment on eligibility issues, no party specifically commented on the "wireless cable" exception to the ITFS/EBS eligibility issue. We conclude that this rule should not apply to EBS post-transition. We believe that the changes we have made to our rules, especially the inclusion of BRS and EBS in our secondary market rules, provides commercial operators with sufficient access to BRS spectrum. We note that this rule could be difficult to apply in the context of geographic area licensing. Given that EBS-eligible licensees have not been able to apply for new stations in this band since 1995, we believe the better action is to restrict access to ITFS frequencies after the transition to educational institutions and non-profit educational organizations.

350. In the absence of a record, we seek further comment on whether retain the rule at this time for markets that have not transitioned. Regardless of our ultimate decision, we will grandfather existing licenses granted pursuant to these rules. Such licenses may continue to be renewed and assigned.

F. Regulatory Fee Issues

351. Section 9 of the Communications Act[712] requires the Commission to assess regulatory fees to recover the costs associated with the Commission's enforcement, policy and rulemaking, user information, and international activities.[713] Below, we seek comment on a new methodology to assess regulatory fees based on the scope of a BRS licensee's authorized spectrum use rather than our current approach of assessing a flat fee per call sign. We also seek comment on our tentative conclusion to apply this updated methodology to ITFS licensees to the extent they are not statutorily exempt from regulatory fees because of their status as governmental or nonprofit entities. Specifically, and as explained in more detail below, we seek comment on a proposed fee methodology that would account for the benefits of an EBS or BRS spectrum authorization based on metrics, such as covered population (MHz/pops) or area

[707] *Second Report and Order* at ¶ 4 and ¶¶ 42-58; *see also Second Report and Order* at Appendix C; 47 C.F.R. § 74.990 (1991).

[708] *See* 47 C.F.R. § 74.990.

[709] *See* 47 C.F.R. § 74.990(a).

[710] *Id.*

[711] *See* 47 C.F.R. § 74.990(e).

[712] 47 U.S.C. § 159. Section 9 was enacted by Congress in 1993. *See* Pub. L. No. 106-553.

[713] 47 U.S.C. § 159(a).

[716] *See NPRM*, 18 FCC Rcd at 6796-7 ¶¶ 183-185.

(MHz/km2), to account for the bandwidth and the potential population or area that could be served.

352. *Background.* In the *NPRM*, we asked whether we should treat BRS and ITFS applicants and licensees differently for fee purposes.[716] We asked whether ITFS licensees and applicants should become subject to regulatory fees, to the extent that such licensees or applicants do not fall within an express statutory exemption.[717] We noted that MDS and ITFS licensees often provide service as part of the same system, and that ITFS licensees presently can lease up to ninety-five percent of their capacity to other entities (usually MDS licensees).[718] In light of these factors and the contemplated changes to our rules that could result in further equality among MDS and ITFS licensees, we sought comment on our tentative conclusion that regulatory fees for MDS and ITFS licensees should be identical. Finally, we sought comment on possibly changing the regulatory fee structure applicable to MDS licensees.[720]

353. Several parties commented on regulatory fee issues.[721] AHMLC states that it is inequitable not to assess fees on ITFS licensees on the grounds that they are non-commercial when, in fact, they often lease up to 95% of their capacity to commercial MDS licensees, which must pay fees. AHMLC therefore asserts that to the extent ITFS fees are not statutorily barred,[722] we should treat commercial ITFS licensees the same as their competitors.[723] By contrast, the Coalition argues that ITFS licensees should be exempt from regulatory fees because most would be exempt as a result of their governmental or nonprofit status.[724] The Coalition also argues that we should treat MDS like WCS for regulatory fee purposes, and include it in the CMRS Mobile Service fee category.[725] The Coalition asserts that the ability to offer CMRS was dispositive in classifying WCS for regulatory fee purposes, and it should be so for MDS. Grand Wireless argues that regulatory fees are particularly onerous for rural operators because, on a per population basis, the fees can amount to multiple times that of fees paid by urban licensees. Grand Wireless therefore asserts that a sliding fee—based upon population density—would more equitably distribute fees.[726]

354. In the *NPRM* we sought comment on how to treat MDS and ITFS applicants and licensees for fee purposes.[727] We sought comment on whether ITFS licensees and applicants should become subject to application fees and regulatory fees, to the extent that such licensees or applicants do

[717] *Id.* at ¶ 184.

[718] *Id.*

[720] *See NPRM*, 18 FCC Rcd at 6797 ¶ 185.

[721] See AHMLC Comments at 8, BellSouth Comments at 13-14 n.21, *Coalition* Comments at 140-141, and Grand Wireless Comments at 3, 13.

[722] Governmental and nonprofit entities are statutorily exempt from Section 9 regulatory fees. 47 U.S.C. § 159(h).

[723] *See* AHMLC Comments at 8. AHMLC also asserts that moving to a GSA licensing model should help reduce fees, and that licensees should be permitted to consolidate station sites in single markets into a single license to avoid multiple renewal and other future call sign-based filings. *Id.*

[724] *See Coalition* Comments at 140.

[725] *See id.* at 140-141.

[726] *See* Grand Wireless Comments at 3, 13.

[727] *See NPRM*, 18 FCC Rcd at 6796-97 ¶¶ 183-185.

not fall within an express statutory exemption.[728] We noted that MDS and ITFS licensees often provide service as part of the same system, and that ITFS licensees presently can lease up to ninety-five percent of their capacity to other entities (usually MDS licensees). In light of these factors and given the proposed rule changes in the *NPRM* that focused on regulatory parity among MDS and ITFS licensees,[729] we sought comment on our tentative conclusion that, to the extent that we determine that ITFS licensees should pay regulatory fees, the regulatory fees for MDS and ITFS licensees should be identical. Finally, we sought comment on changing the regulatory fees applicable to MDS licensees.[730]

355. *Discussion.* Several parties commented on regulatory fees issues and these commenters generally disagree whether ITFS and MDS should pay the same regulatory fee.[731] In light of the comments received in this proceeding regarding fees and our decisions today that confirm EBS as a service distinct from BRS, we have elected to seek further comment on this issue. In our FY 2004 Regulatory Fees proceeding, we have proposed to continue to assess a regulatory fee of $270 for each BRS call sign.[732] We will therefore assess former MDS licensees in the BRS/EBS spectrum the regulatory fee amount determined in the FY 2004 Regulatory Fee proceeding. Because current EBS licensees are not subject to application and regulatory fees under the Commission's rules, and because most such licensees are exempt from fees as non-profit corporations or governmental institutions, we have determined that EBS licensees will not be subject to regulatory and application fees at this time. In future years, however, we believe the public interest would be better served by assessing BRS/EBS regulatory fees based on the scope of a licensee's authorized spectrum use.

356. Continuing to define regulatory fee categories based simply on a "type of service" scheme may no longer serve the public interest. We are sensitive to Grand Wireless's concern that rural licensees may be disadvantaged by having to pay the same regulatory fees as their urban counterparts whose licenses often cover a much greater population. Technological advances and the increased flexibility that the Commission has provided to ITFS licensees in this proceeding moreover have made their spectrum more fungible with MDS spectrum. Indeed, technological advances in recent years enable licensees utilizing distinct, but relatively close, frequency bands to provide services that are virtually indistinguishable to customers.[733] Rather than adopt service-based fee categories for MDS and ITFS, we intend to eliminate fee differences between these services that currently have similar spectrum benefits.[734]

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[728] Governmental entities are statutorily exempt from Section 8 fees, and both governmental entities and nonprofit entities are statutorily exempt from Section 9 fees. 47 U.S.C. §§ 158(d)(1), 159(h).

[729] *See NPRM,* 18 FCC Rcd at 6742 ¶ 41.

[730] *See id.* at 6797 ¶ 185.

[731] *See* AHMLC Comments at 8 (to the extent ITFS fees are not statutorily barred, treat commercial ITFS licensees the same as their competitors), BellSouth Comments at 13-14 n.21, *Coalition* Comments at 140-141 (ITFS licensees should be exempt from regulatory fees because most would be exempt as a result of their governmental or nonprofit status; MDS should be should treat ed like WCS for regulatory fee purposes and included in the CMRS Mobile Service fee category), and Grand Wireless Comments at 3, 13.

[732] In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004, MD Docket No. 04-73, *Notice of Proposed Rule Making*, 19 FCC Rcd 5795 (2004).

[733] For example, due to the advent of improved signal processing and silicon technologies, cellular mobile operations once limited to bands below 1 GHz, are now technically feasible in the 1.9 GHz band (Personal Communication Services).

[734] We note that several different types of microwave services have dissimilar general characteristics and, hence, dissimilar spectrum benefits, yet are subject to the same fee. For example, various private and common carrier (continued....)

If we adopt a new fee methodology, licensees should be able to determine their fee obligations through a simple calculation, based predominantly on fixed, known variables.[735]

357. We propose a methodology to assess regulatory fees based on the scope of an BRS or EBS licensee's authorization and the benefits provided to licensees thereunder in accordance with Section 9(b)(3) and Section 9(b)(1)(a) of the Act.[736] Section 9(b)(1)(A) requires that fees "be adjusted to take into account factors that are reasonably related to the benefits provided to the payer of the fee by the Commission's activities, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest."[737] Section 9(b)(3) further provides that permissive amendments to the regulatory fee schedule shall "reflect additions, deletions, or changes in the nature of [our] services as a consequence of Commission rulemaking proceedings or changes in law."[738] Our goal is to ensure comparable treatment of similarly situated BRS/EBS licensees based on factors more reasonably related to the benefits they receive under their spectrum authorizations rather than assessing a flat fee per call sign.

358. Assessing fees based on the benefits of spectrum requires that we quantify and measure those benefits to the greatest extent possible. In addition to the coverage area and the extent of exclusivity specified in Section 9(b)(1)(A), we invite comment on other factors that would enable us to approximate better the benefits of a spectrum authorization and that are necessary in the public interest. Specifically, we seek comment on a proposed fee methodology that would account for the benefits of an BRS/EBS spectrum authorization based on metrics, such as covered population (MHz/pops) or area (MHz/km2), to account for the bandwidth and the potential population or area that could be served. A metric such as MHz/pops, which we have used in spectrum auctions to determine upfront payment amounts and bidding eligibility,[739] would account more precisely for the relative benefits of a particular spectrum authorization.

359. We propose that any metric that we adopt be applied consistently to all BRS/EBS licensees. Commenters should address the costs and benefits of adopting a metric based upon covered population (MHz/pops), square kilometers (MHz/km2), some combination of these measures, or any other method of calculating the licensee's regulatory fee. We seek comment on the ability of such metrics to accurately measure the benefits of the spectrum underlying a given authorization. A metric based on the size of the area that an authorization covers might undervalue spectrum in small, densely populated urban

(Continued from previous page)
point-to-point links are licensed with various sized channels such as a 5 MHz, 20 MHz, or a 40 MHz channel and can only operate over that one link, whereas some licensees have geographic license areas, yet common carrier and private microwave fee categories were both subject to an annual regulatory fee of $25 per license in FY 2003. The types of benefits received from these different services do not relate in a methodical way to fees owed.

[735] If the total amount of regulatory fees that Congress requires us to collect varies each year, which in the past has increased on average by no more than 11.2 percent, this would be the only variable that would be less predictable. This average does not reflect the fee increase from FY 1994 to FY 1995. The FY 1994 fees covered a partial year and the percentage increase in fees from FY 1994 to FY 1995 therefore was atypically high, 84.76 percent.

[736] 47 U.S.C. §§ 159(b)(3) and (b)(1)(A).

[737] 47 U.S.C. § 159(b)(1) (emphasis added).

[738] 47 U.S.C. § 159(b)(3).

[739] *See Public Notice*, "Auction of C, D, E, And F Block Broadband PCS Licenses Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband Personal Communications Services Licenses Scheduled for March 23, 1999 Minimum Opening Bids And Other Procedural Issues," Report No. Auc-98-22-C (Auction No. 22), DA 98-2604 13 FCC Rcd 24540 (rel. Dec. 23, 1998).

areas relative to large, sparsely populated rural areas. Metrics driven by the ratio of spectrum to population similarly also might undervalue spectrum in urban areas. Another approach, similar to that applied to regulatory fees for television stations, would be to group categories of licenses by market rank as determined by the population of the market served or geographic licensed service area. We also seek comment on a proposed metric's ability to logically and consistently rank the benefits of spectrum authorizations.

G. Gulf of Mexico Proceeding

360. In the *NPRM*, we incorporated the docket of the ongoing Gulf of Mexico proceeding, wherein the Commission proposed to establish a GSA in the Gulf of Mexico known as the "Gulf Service Area," subject to the same rules as the service areas established in the *Report and Order*, with certain limitations.[740] This rulemaking was initiated by Gulf Coast MDS Service Company ("Gulf Coast"), which sought to have the Gulf of Mexico treated as one service area with MDS and ITFS licenses assigned by competitive bidding.[741] PetroCom License Corporation ("PetroCom"), Gulf Coast's successor in interest, continues to request that the Commission establish a service area in the Gulf of Mexico using the *Report and Order* as a model,[742] but opines that the Commission should only authorize two licenses in the area and adopt eligibility restrictions to avoid excessive concentration of licenses.[743]

361. As noted in the *NPRM*, commenters generally supported the creation of a Gulf Service Area.[744] However, some commenters expressed concern over the timing of the adoption of rules for the service area due to certain technical and economic aspects of the proposal.[745] These commenters sought to

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[740] Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking*, WT Docket No. 02-68, 17 FCC Rcd 8446 (2002) (*Gulf Notice* or *Gulf of Mexico MDS NPRM* or *Gulf NPRM*). That proceeding was incorporated alongside the matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Services in the 2150-2162 and 2500-2690 MHz Bands. *NPRM*, 18 FCC Rcd at 6759 ¶ 91 (2003) (*NPRM*). *See Gulf Notice*, 17 FCC Rcd at 8447 ¶ 2.

[741] Petition for Rulemaking of Gulf Coast MDS Service Company (Gulf Coast Petition) (May 21, 1996).

See NPRM, 18 FCC Rcd at 6759 ¶ 91; *see also* Gulf Coast Petition. *See also* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 9589, 9608-17 ¶¶ 34-55 (1995) (*MDS Report and Order*).

[742] *See* Amended Petition at 4. "In the *MDS Report and Order*, the Commission adopted a licensing plan under which it assigned, through a simultaneous multiple round bidding process, one MDS authorization for each of the 487 BTAs and six additional geographic areas" as defined in Rand McNally's 1992 *Commercial Atlas and Marketing Guide*. *NPRM*, 18 FCC Rcd at 6759 ¶ 89, n.190 (citing *MDS Report and Order*, 10 FCC Rcd at 9608-09 ¶¶ 34-37). BTA authorization holders may construct facilities to provide service over any usable MDS channel within the BTA, although, such channels are only usable subject to the Commission's interference standards. *MDS Report and Order*, 10 FCC Rcd at 9608-18 ¶¶ 34-55.

[743] *See NPRM*, 18 FCC Rcd at 6759 ¶ 92 (citing Amended Petition for Rulemaking of PetroCom License Corporation (Amended Petition) (Nov. 23, 1998)).

[744] *See id.* at 6760 ¶¶ 92-93.

[745] *See id.* at 6760 ¶ 93. *See, e.g.*, PetroCom Comments at 3-5; Stratos Offshore Services Company at 2-3 (Stratos Offshore); WCA Comments at 4; PetroCom Reply Comments at 1-4; Sprint Reply Comments at 31.

delay the licensing of MDS in the Gulf of Mexico until after the Commission addressed the Coalition's proposals [746] and until the Commission established service rules. [747] However, because the rapid development and deployment of services to as many areas and populations as prudently possible is an important goal in this proceeding, in the *NPRM*, we adopted the proposal to create a Gulf service area because such a preliminary step "would not have to wait for the adoption of final rules in the proceeding."[748] We believed that to delay acting without having encountered any commenter opposition to the proposal would unnecessarily hinder the needs of businesses and consumers in the Gulf of Mexico region.[749] We agreed with the Gulf Coast Petition that establishing the Gulf Service Area "would allow specialized businesses that operate in the Gulf of Mexico to obtain advanced communication services that are currently unavailable to them" and thus operate more efficiently.[750]

362. While we proposed to create the Gulf Service Area for MDS services, we also proposed in the *Gulf Notice* to exclude all ITFS channels from licensing in the Gulf service area.[751] Our proposal was based on the fact that ITFS licensees had not expressed interest in seeking licenses to operate in the Gulf of Mexico, the area most likely had little need for educational service, and the requested commercial use did not require the full bandwidth available in the 2500-2690 MHz band.[752] We sought comment on this proposal and on whether we should consider unlicensed uses in the Gulf of Mexico.[753] We did not receive comment on these proposals, and therefore renew our request for feedback on these issues.

363. We noted in the *NPRM* that the Gulf Service Area does not have a significant population center and is based primarily on the geographic confines of the Gulf and on the likely commonality of commercial interests among the potential users in the Gulf.[754] Therefore, we believe that setting the proper geographic boundaries for the Gulf Service Area is particularly important as we seek to ensure the best possible service both inside the GSA and in neighboring service areas. In the Gulf Notice, the Commission proposed to use the same boundary definitions as adopted in the WCS *Report and Order*.[755] Pursuant to this approach, land-based license regions neighboring the Gulf area would extend to the limit of United States territorial waters in the Gulf of Mexico, which extend to the maritime zone approximately

[746] *See* WCA Comments at 4; Stratos Offshore Comments at 3.

[747] *See* PetroCom Comments at 3-5; PetroCom Reply Comments at 1-4. *See also NPRM* at ¶ 93.

[748] *See NPRM*, 18 FCC Rcd at 6761 ¶ 93.

[749] *See id.*

[750] *See id.* We note that the Gulf of Mexico area is a strong example of an underserved area where, for a lack of any significant population center, service has not been built out. Calls for delaying the creation of the proposed Gulf Service Area, without any indication that adverse consequences will result from this step alone, frustrates the Commission's goal of the rapid, nationwide deployment of services to areas and populations in need. *See also* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10816 ¶ 59 (1997) (*WCS Report and Order*) ("[C]reating a service area for the Gulf of Mexico region will help meet the growing communications needs of businesses operating in the Gulf.").

[751] *See Gulf Notice*, 17 FCC Rcd at 8450 ¶ 13. *See also NPRM* at 6761 ¶ 94.

[752] *See Gulf Notice*, 17 FCC Rcd at 8450 ¶ 13.

[753] *See NPRM*, 18 FCC Rcd at 6761 ¶ 94.

[754] *See id.* at 6761 ¶ 95.

[755] *See Gulf Notice*, 17 FCC Rcd at 8453 ¶ 18. *See also WCS Report and Order*, 12 FCC Rcd at 10816.

twelve nautical miles from the United States coastline.

364. PetroCom disagrees with the Commission's proposal to establish the demarcation line of the Gulf Service area at twelve nautical miles from the coastline and maintains that the better approach is to define the Gulf Service Area boundaries as the land-water line.[756] PetroCom points out that the land-water line was adopted as the boundary for cellular services.[757] Furthermore, PetroCom asserts that a shoreline boundary mirrors Commission rules regarding BTAs, as defined by Rand McNally, where boundaries follow county lines.[758] PetroCom argues that current MDS and ITFS licensees provide fixed services that do not require protection beyond the shore,[759] and that allowing land-based MDS and ITFS operations to extend into the Gulf will create interference problems for prospective Gulf licensees.[760] Thus, PetroCom implies that the Commission proposal to follow the WCS *Report and Order* boundary definitions will benefit incumbent land-based licensees at the expense of potential entrants, and discourage Gulf licensees from fully developing their systems.[761]

365. The Coalition disagrees with the Commission's decision to immediately establish the Gulf Service Area.[762] The Coalition further argues that any future operations in the Gulf must not adversely impact land-based services using the 2.5 GHz band. Noting that the 35-mile radii allotted to PSAs may extend well into the Gulf,[763] the Coalition argues that existing BTAs and PSAs must be fully protected.[764] WCA also contends that county line boundaries forming the basis for BTA boundary definitions extend into the Gulf as well, contrary to PetroCom's assertions.[765] Therefore, the Coalition supports a Gulf Service Area boundary beginning approximately twelve miles from shore.[766] The Coalition suggests further that any area between the Gulf Service Area and existing land-based service areas should be designated a Gulf Coastal Zone and that both the Gulf Service Area provider and the adjacent land-based service provider should be permitted to offer service therein.[767] We seek additional comment on the merits of the boundary definitions proposed by both PetroCom and the Coalition.

366. Sprint is similarly concerned that Gulf operations could interfere with its own land-based operations.[768] Therefore, Sprint also favors defining the boundary for the Gulf Service Area as twelve

[756] *See* PetroCom Comments at 5-6.

[757] *See* PetroCom Comments at 5-6 (citing Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, *Report and Order*, 17 FCC Rcd 1209, 1219 ¶ 31 (2001) (*Gulf Cellular Order*).

[758] See PetroCom Comments to the Amended Petition at 4.

[759] *See* PetroCom Comments at 6.

[760] *See* PetroCom Reply Comments at 5.

[761] *See* PetroCom Reply Comments at 5.

[762] *See* WCA Comments at 74.

[763] *See* WCA Comments at 79.

[764] *See* WCA Comments at 74.

[765] *See* WCA Comments at 79-80.

[766] *See* WCA Comments at 80.

[767] *See* WCA Comments at 81.

[768] *See* Sprint Comments at 15-16.

nautical miles from the coastline.[769] Sprint further shares the Coalition's concern that a particular interference problem known as "ducting" may be caused by operations in the Gulf Service Area.[770] We seek additional comment on the ducting propagation phenomenon. For example, how often does ducting occur and will there be ducting of inland signals? Can any steps be taken to minimize the adverse impacts of signal propagation?

367. As previously noted, commenters requested that the Commission delay considering the issues presented in the *Gulf Notice* until after the Commission considered the Coalition proposal to transform the service.[771] We remain concerned that the record is not sufficiently developed to resolve issues concerning the amount of spectrum to license in the Gulf Service Area, competitive bidding, partitioning and disaggregation, interference protection requirements, construction periods, and license term. Therefore, we renew our request for comment on these and the other issues discussed herein.

H. Streamlining FCC Review of Transactions

368. As discussed in Section III.B.4, we expect that the transition to the new band plan will be implemented swiftly, and we anticipate that proponent-driven transition plans are likely to involve the assignment, partitioning, disaggregation, and leasing of spectrum usage rights in order to rationalize new spectrum holdings. We seek comment generally on ways to streamline our current procedures for reviewing these transactions to facilitate more efficient transitions.

369. We note that we have taken steps to simplify the licensing process and remove unnecessary regulatory burdens by standardizing a number of MDS and ITFS practices and procedures. For example, once mandatory electronic filing in ULS is in place, MDS and ITFS licensees will use FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. We seek comment on whether additional streamlining of the filing or review process for transfers and assignments, as well as spectrum leases, should be implemented. In addition, in Section IV.D.6, we decided to permit partitioning and disaggregation for both ITFS and MDS licensees. We seek comment on whether the procedures set forth in Section 21.931 and Section 1.948 of our rules permit sufficiently streamlined notification and review. We seek comment on any other ways to streamline our procedures for transactions involving MDS and ITFS licensees.

I. Continuing Review of Progress Towards Policy Goals

370. *Background.* In the *R&O*, we have taken a series of actions to further our broadband and spectrum policy goals. Perhaps the most fundamental action we took was to adopt a radically altered band plan in order to facilitate the development of wireless broadband systems and to reduce the likelihood of interference caused by incompatible uses. We have also adopted a streamlined transition plan designed to facilitate a rapid transition to the new band plan while preserving the existing uses in the band. In addition, we have retained the EBS eligibility requirements in order to protect and promote existing and new educational uses in the band. We have also taken various other actions to facilitate the development

[769] *See* Sprint Comments at 15-16.

[770] *See* Sprint Comments at 15-16. *See also* WCA Comments at 74-78.

[771] *See NPRM*, 18 FCC Rcd at 6762 ¶ 97.

of advanced broadband and educational systems and to eliminate outdated and burdensome rules on our licensees. While we are asking for broad policy information in response to this aspect of the *FNPRM*, we do not intend to revisit the policy decisions we have made in the *R&O*. Our purpose in asking these questions is to gather information that will allow us to monitor developments in the band to ensure that we are responsive to future changes.

371. The goals we seek to accomplish in this proceeding, however, are not short term. Rather, we seek long-term and sustainable changes in this band. Indeed, as explained in the R&O, we believe that the changes we have implemented will unlock much of the promise in this band. Given the importance of lasting transformation of this band, we believe it is important to actively review the state of development in this band to ensure that the measures we have adopted today accomplish our stated policy goals. We are committed to ensuring that the Commission takes an active role in assessing whether our policy goals remain appropriate and, more importantly, whether the specific rules we have adopted are appropriately tailored to meet our policy goals. In that regard, we seek comment on various issues relating to the future of BRS and EBS.

372. *Discussion.* Given the many difficulties that licenses have traditionally faced in deploying services in this band, we believe it is particularly important in this proceeding that we continue to actively monitor the state of deployment in this band. In order to keep fully informed, we seek comment on the future trends that licensees, equipment manufacturers, and other stakeholders expect for BRS and EBS. For example, we ask licensees that currently use BRS or EBS for high-power operations to provide their expectations as to how long they expect the MBS will be used for high-power operations. We will continue to monitor progress in the use of BRS in providing advanced wireless broadband services, as well as the success of EBS in meeting their educational mission. We invite comments on how we can continue to ensure that the Commission's licensing policies truly support that important educational aim. It is critical that the Commission's rules and policies concerning BRS and EBS facilitate deployment of services to educational institutions, students, and broadband services to consumers generally. Time is of the essence. We understand that both the demand and the technology is there for a third broadband pipe into the home. We expect that licensees will aggressively take advantage of the opportunities we are creating today to offer advanced and innovative services to customers and students. Efficient use of spectrum is of paramount importance. We will closely monitor deployment to determine whether changes are necessary down the road and whether the rules and policies we have adopted continue to have a nexus to our laudable goals.

373. We intend to closely monitor the marketplace to determine whether the rules we have adopted are serving their intended purpose. We strongly anticipate that as a result of the rules we are adopting today, this band will be much more intensively utilized by commercial interests, educational interests, and other entities. We seek comment on the type of information we should track in order to monitor deployment, as well as information that would help us to identify obstacles to deployment. To the extent that deployment is not taking place in the band, we intend to thoroughly review the situation and consider appropriate changes to our rules. For example, if BRS and EBS spectrum is being underutilized, there could be several possible causes for that underutilization. Further revisions could be necessary to our technical rules. Alternatively, continued technological and market developments could have unanticipated effects on this band. We ask commenters to provide examples of the types of information that the Commission should look at to determine whether our rules are working as intended.

374. We recognize that the ultimate success in recreating this band is also closely linked to the availability of investment dollars in support of wireless broadband services. We believe that our rules create a more stable environment that will promote additional capital investment. However, we seek comment on whether there are additional actions that we can take that will compel additional investment.

At the same time, we seek comment on whether there are any actions that we are taking that may hinder or provide disincentives to investment.

VI. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

375. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.[772]

B. Comment Period and Procedures

376. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules,[773] interested parties may file comments on this Notice on or before [30 days from publication in the Federal Register], and reply comments on or before [60 days from publication in the Federal Register]. Comments and reply comments should be filed in WT Docket No. 03-66, and may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[774] All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

377. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by e-mail via the Internet. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

378. Parties who choose to file by paper must file an original and four copies of each filing. If parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. Furthermore, parties are requested to provide courtesy copies for the following Commission staff: (1) Nancy Zaczek, Genevieve Ross, and Stephen Zak, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 3-C124, Washington, D.C. 20554; and (2) William Huber and Erik Salovaara, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room. 4-A760, Washington, D.C. 20554. One copy of each filing (together with a diskette copy, as indicated below) should also be sent to the Commission's copy contractor, Best Copy and Printing, Inc, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 1-800-378-3160.

379. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be attached to the original paper filing submitted to the Office of the Secretary. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using

[772] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

[773] *See* 47 C.F.R. §§ 1.415, 1.419.

[774] Electronic Filing of Documents in Rulemaking Proceedings, *Report and Order*, 13 FCC Rcd 11322 (1998).

Microsoft TM Word 97 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 202-863-2893.

380. The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D. C. 20554, and on the Commission's Internet Home Page: <http://www.fcc.gov>. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc., 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 1-800-378-3160. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

C. Final Regulatory Flexibility Analysis

381. The Regulatory Flexibility Act (RFA)[775] requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[776] Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the impact of the rule changes contained in this *R&O* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

D. Initial Regulatory Flexibility Analysis

382. As required by the Regulatory Flexibility Act of 1980 (RFA),[777] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the Notice. The analysis is found in Appendix A. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the *NPRM* & MO&O, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *NPRM* & MO&O, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

E. Paperwork Reduction Analysis

383. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements

[775] *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[776] 5 U.S.C. § 605(b).

[777] *See* 5 U.S.C. § 603.

contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

384. In this present document, we have assessed the effects of requiring licensees to file Initiation Plans and Post Transition Notification Plans, and find that these requirements will not adversely affect businesses with fewer than 25 employees. First, it is unlikely that such businesses will serve as Proponents under our new Transition Plan thereby triggering the requirement to file an Initiation Plan as we generally expect that Proponents will largely consist of larger businesses with sufficient revenue to transition an entire market. To the extent that such businesses would serve as Proponents, the filing of Initiation Plans will not constitute a burden or require significant paperwork preparation because these Proponents will meet this filing requirement, by submitting, in whole or in part, their written agreements on transition. With regard to the Post Transition Notification Plan, we do not believe that such a filing would constitute a burden to businesses with fewer than 25 employees because such notices will consist of simple notification to the Commission that the transition has been completed. This notification is in the public interest because it will help to ensure that the BRS/EBS spectrum is properly utilized. We seek comment on these conclusions.

F. Further Information

385. For further information concerning this rulemaking proceeding, contact Genevieve Ross or Nancy Zaczek, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B-153, Washington, D.C. 20554; at (202) 418-2487 or via the Internet to Nancy.Zaczek@fcc.gov or Genevieve.Ross@fcc.gov.

VII. ORDERING CLAUSES

386. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Report and Order* is hereby ADOPTED.

387. IT IS FURTHER ORDERED, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Further Notice of Proposed Rulemaking* is hereby ADOPTED.

388. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in this *Further Notice of Proposed Rulemaking*, and that comment is sought on these proposals.

389. IT IS FURTHER ORDERED, that the proceeding entitled Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217 IS TERMINATED.

390. *IT IS FURTHER ORDERED* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order & Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

(For Further Notice of Proposed Rulemaking)

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[778] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Further Notice of Proposed Rule Making (FNPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines specified in the *FNPRM* for comments. The Commission will send a copy of this *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[779] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[780]

Need for, and Objectives of, the Proposed Rules:

2. In this *FNPRM* we seek comments on solutions to implement in the event that the plan we adopt today for transitioning to the new band plan, set forth in section IV.A.5, *supra,* does not reach a satisfactory stage of implementation within three years. A quick and efficient transition to a segmented, de-interleaved band plan is critical to ensuring that the public spectrum resource represented by the 2500-2690 MHz band does not remain underutilized. We have adopted a new band plan to further the public interest in efficient and intensive use of spectrum. To prevent undue delay in implementing the new band plan, the transition process will sunset in each major economic area[781] where a proponent does not timely file within three years of the rules' effective date a transition proposal that has resolved, pursuant to the Commission's rules, any properly presented objections. This three year time limit will provide an incentive for existing users to develop transition proposals in a timely manner.[782] Finally, recognizing that parties may not be able to control the timing of all aspects of the transition, we require only that the proposal be finalized, with any objections addressed, and filed within the three-year period.

3. Irrespective of how well the transition process to the new band plan is designed, it may

[778] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[779] *See* 5 U.S.C. § 603(a).

[780] *See* 5 U.S.C. § 603(a).

[781] For detailed discussion on MEAs, *see* para. 82, *supra.*

[782] Three years is an adequate period for existing users to develop a detailed proposal for transitioning existing uses and facilities to the new band plan and address objections from other users. As an initial matter, many existing users already have had ample time to consider transitions to the new band plan. The new band plan and the transition process incorporate substantial elements of the Coalition's proposal, which has been the subject of extensive public comment for nearly two years. Moreover, many users of this spectrum are members of the Coalition and played a role in crafting the initial proposal.

not be possible for private parties to transition existing uses to the new band plan in a way that balances the public interest in protecting those uses with the public interest in the new band plan. There are large numbers of existing users in the band with varied and disparate interests. A proponent therefore must coordinate large numbers of substantially varying interests in order to transition to the new band plan. A proponent may not come forward in every major economic area and every proponent that comes forward may not be able to resolve all reasonable objections made to its proposal. Furthermore, the transition process may not perfectly define reasonable transition proposals or rapidly and accurately determine whether particular objections to particular transitions are reasonable. Consequently, transitions to the new band plan may not occur within one or more major economic area within the allotted time.

4. Consequently, we tentatively conclude herein that in major economic areas that are not transitioned to the new band plan pursuant to the transition process we have adopted herein,[783] the public interest in services made possible by the new band plan will be best served by clearing existing users from the spectrum. The transition process we have adopted represents the best effort at transitioning existing use to facilities compatible with the new band plan. While new transition plans, including in areas otherwise without one, might result from refinements to the transition process, we conclude that the absence of a timely filed Initiation Plan[784] indicates that existing uses cannot be reasonably balanced with the new band plan in the relevant area. Consequently, the public will receive the benefits of the new band plan only if existing users are cleared from the spectrum and the Commission grants new licenses to use the spectrum consistent with the new band plan. Accordingly, we propose to implement this transition process in areas where the requirements we have instituted herein are not met within the required time frame.

5. As stated in the text of the *FNPRM*,[785] we request comment on a number of issues relating to competitive bidding procedures that could be used to assign new licenses in this band by auction. We propose to conduct any such auction in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and substantially consistent with many of the bidding procedures that have been employed in previous auctions.[786] Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[787] Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.[788] In addition, consistent with current practice, matters such as the appropriate competitive

[783] *See* section IV.A.5, *supra.*

[784] *See* paras. 86-87, *supra.*

[785] *See* para. 264-319, *supra.*

[786] *See, e.g.,* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making,* 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order); Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part 1 Recon Order/ Fifth Report and Order* and *Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order,* 17 FCC Rcd 2962 (2002).

[787] *See* 47 C.F.R. § 1.2101 *et seq.*

[788] *See Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293; *see also Part 1 Recon Order/Fifth Report and Order*, 15 FCC Rcd 15293 (*recon. pending*) [cite check – recon pending?].

bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[789] We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band, and on whether alternative rules would more effectively serve our basic purposes.[790]

6. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in the auction. With respect to the auction of EBS licenses, we further seek comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions.

7. In the *Part 1 Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience.[791] The standard schedule appears at Section 1.2110(f)(2) of the Commission's rules.[792] Are these levels of bidding credits appropriate for this band? For this proceeding, we would propose to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding $15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding $3 million for the same period as an "entrepreneur."[793] In the event that we offer bidding credits on this basis, we propose to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).[794] Finally, we invite comment on the effect of potentially having three small business sizes, and bidding credits, for new licenses in this band while having had only one small business size (average annual gross revenues for the preceding three years not exceeding $40 million) and one credit (15%) in the BRS service.[795] We seek comment on this proposal.

8. We recognize that educational institutions and non-profit educational organizations eligible to hold EBS licenses may have unique characteristics. We therefore invite comment on whether

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[789] *See* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55, ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part 1 Third Report and Order*).

[790] In 1997, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." *See* 47 U.S.C. § 309(j)(4)(D). In addition, section 309(j)(3)(B) of the Act provides that in establishing eligibility criteria and bidding methodologies, the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." *See* 47 U.S.C. § 309(j)(3)(B).

[791] *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

[792] *See* 47 C.F.R. § 1.2110(f)(2).

[793] *See* 47 C.F.R. § 1.2110(f)(2). We note that we will coordinate the small business size standards for ITFS in this proceeding with the U.S. Small Business Administration.

[794] 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[795] *See* 47 C.F.R. § 21.961(b).

distinctive characteristics of EBS licensees require distinct rules for assessing the relative size of potential participants in an auction. How do our designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to EBS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? We seek comment on whether the non-commercial character of EBS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual gross revenues should be used for identifying small entities among EBS licensees and similar applicants.

9. Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services. Commenters also should consider whether the band plan and characteristics of the band suggest adoption of other small business size definitions and/or bidding credits in this instance.

10. We believe our proposals will encourage utilization of this band and the development of new innovative services to the public such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our proposals will provide licensees flexibility of use which will allow them to adapt quickly to changing market conditions and the marketplace.

Legal Basis:

11. The proposed action is authorized under Sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:

12. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[796] The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small organization," and "small governmental jurisdiction."[797] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[798] A small business concern is one

[796] 5 U.S.C. § 603(b)(3).

[797] 5 U.S.C. § 601(6).

[798] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[798] 15 U.S.C. § 632.

which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[799]

13. Nationwide, there are 4.44 million small business firms, according to SBA reporting data.[800] In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted pursuant to this *NPRM*. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its Trends in Telephone Service report.[801] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[802] Paging,[803] and Cellular and Other Wireless Telecommunications.[804] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

14. *Multipoint Distribution Service*, Multichannel Multipoint Distribution Service, and ITFS. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[805] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[806] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[807] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[808] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more

[799] 15 U.S.C. § 632.

[800] *See* 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[801] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

[802] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

[803] 13 C.F.R. § 121.201, NAICS code 517211.

[804] 13 C.F.R. § 121.201, NAICS code 517212.

[805] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O*).

[806] 47 C.F.R. § 21.961(b)(1).

[807] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

[808] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)", Table 4, NAICS code 513220 (issued October 2000).

but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[809] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

15. In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[810] The Commission established this small business definition in the context of this particular service and with the approval of SBA.[811] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[812] Of the 67 auction winners, 61 met the definition of a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that are considered small entities.[813] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in this *NPRM & MO&O*.

16. Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

17. In addition, the SBA has developed a small business size standard for Cable and Other

[809] In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[810] 47 C.F.R. § 21.961(b)(1).

[811] *See MDS Auction R&O,* 10 FCC Rcd 9589.

[812] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See Id.* at 9608.

[813] 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $11 million or less)). *See* 13 C.F.R. 121.201, NAICS code 513220.

Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

18. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

19. Cable and Other Program Distribution. This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed herein.

20. There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions (these 100 fall in the MDS category, above). Educational institutions may be included in the definition of a small entity.[815] ITFS is a non-profit non-broadcast service that, depending on SBA categorization, has, as small entities, entities generating either $10.5 million or less, or $11.0 million or less, in annual receipts.[816] However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we find that up to [1932] of these educational institutions are small entities, some of which these providers, specifically those who have not met the requirements for transition articulated herein may be affected by our spectrum clearing proposal

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

21. There are no new reporting, recordkeeping or other compliance requirements proposed in the *FNPRM.*

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

22. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance

[815] *See* 5 U.S.C. §§ 601 (3)-(5).

[816] *See* 13 C.F.R. § 121.210 (SIC 4833, 4841, and 4899).

or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[817]

23. In this *FNPRM*, we seek comment on a spectrum clearing proposal[818] to ensure that the 2500-2690 MHz band does not lie fallow. Inasmuch as this proposal provides opportunities for new entrants in the band, it opens up economic opportunities to a variety of spectrum users, including small businesses. In the *R&O* portion of this document, we have adopted an alternative to this spectrum clearing proposal, which consists of transitioning current users to the new band plan also adopted.[819] Our spectrum clearing proposal could be implemented in the event that the plan we adopt is not satisfactorily implemented within three years. Therefore, affected parties have been given an alternative to our spectrum clearing proposal, and will only be subject thereto in the event that they do not comply with our new rules in a reasonable amount of time. We also seek comment on significant alternatives commenters believe we should adopt.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

24. None.

[817] *See* 5 U.S.C. § 603(c).

[818] *See* section V.A.2, *supra*.

[819] *See* section IV.A.5, *supra*.